

ENTERED

F 2302

San Francisco Law Library

436 CITY HALL


No. 161573

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

2973

No. 15119

United States
Court of Appeals
for the Ninth Circuit

RAYMOND PERCIFIELD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILE

OCT 9 195

PAUL P. O'BRIEN, C

No. 15119

United States
Court of Appeals
for the Ninth Circuit

RAYMOND PERCIFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of.....	1
Certificate of Clerk to Record on Appeal.....	359
Concise Statement of Points Relied Upon on Appeal	360
Defendant's Offered Instructions	6
Exhibit, Plaintiff's:	
No. 32—Affidavit of Percifield, Raymond S.	209
Information	3
Information, Amended	4
Judgment and Order of Probation.....	16
Motion for New Trial.....	11
Notice of Appeal	19
Order Denying Motion for New Trial.....	15
Transcript of Proceedings	21
Instructions to the Jury	323
Witnesses, Defendant's:	
Caldwell, Hugh L.	
—direct	241

	INDEX	PAGE
Witnesses, Defendant's—(Continued)		
Elam, William H.		
—direct		238
—cross		239
Fulton, Robert		
—direct		247
—cross		248
Glenn, Charles S.		
—direct		228
—cross		231
Lange, Morris		
—direct		187
—cross		189
—redirect		192
Proctor, Joyce		
—direct		182
—cross		185
Smith, William W.		
—direct		232
—cross		234
—redirect		237
Witnesses, Plaintiff's:		
Beemer, William B.		
—direct		110
—cross		111
—redirect		112

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Bell, James W.

—direct 193

—cross 218

Calkins, Forrest P.

—direct 250, 268

—cross 295

—redirect 315, 318

—recross 317

Carter, J. Leslie

—direct 24, 66

—cross 28, 69

Craft, Blake

—direct 94

—cross 98

—redirect 99, 100

—recross 99

Craft, Cora

—direct 32

—cross 39

Fortner, W. D.

—direct 78

—cross 83

Jones, Eleanor

—direct 122

—cross 135, 153

—redirect 147, 170, 173

—recross 172

Witnesses, Plaintiff's—(Continued)

Lehman, William

—direct 117

—cross 121

—redirect 121

Lockett, James L.

—direct 107

May, Robert J.

—direct 103

—cross 105

Oakley, Donald

—direct 46

—cross 49

—redirect 50

Rider, Donald C.

—direct 112

—cross 116

—redirect 117

Rosa, Jennie

—direct 51

—cross 55

—redirect 56

Rosa, Joe

—direct 58

—cross 61

—redirect 64

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Smith, William W.

—direct 70

—cross 73

Stroud, Edward A.

—direct 86

—cross 94

Taylor, Bert

—direct 174

—cross 180

Thomas, Michael E.

—direct 223

—cross 226

Winder, E. Joseph

—direct 39, 44

—cross 43, 45

White, Clifford C.

—direct 29

—cross 31

Verdict 11

NAMES AND ADDRESSES OF ATTORNEYS

MAURICE J. HINDIN,
Attorney at Law,
6399 Wilshire Blvd.,
Los Angeles 48, Calif.,
For the Appellant.

FRANKLIN RITTENHOUSE,
United States District Attorney;

STANLEY H. BROWN,
Post Office Building,
Reno, Nevada;

CLYDE R. MAXWELL,
Attorney, Int. Rev. Service,
Flood Building,
870 Market Street,
San Francisco, Calif.,
For the Appellee.

In the United States District Court for the
District of Nevada

No. 12822

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND PERCIFIELD,

Defendant.

INFORMATION FOR VIOLATION SEC.
145(B), INTERNAL REVENUE CODE OF
1939, TITLE 26, U.S.C. 145(B)

The United States Attorney Charges:

Count One

That on or about the 15th day of March, 1949, at Reno, Nevada, in the District of Nevada, Raymond Percifield, defendant named above, did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue at Reno, Nevada, a false and fraudulent tax return, wherein he stated that his net income for the calender year 1948 was nil, when in fact it was \$14,083.06.

Count Two

That on or about the 15th day of March, 1950, at Reno, Nevada, in the district of Nevada, Raymond

Percifield, defendant named above, did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue at Reno, Nevada, a false and fraudulent tax return, wherein he stated that his net income for the calendar year 1949, was nil, when in fact it was \$6,372.02.

MADISON B. GRAVES,

United States Attorney;

By /s/ STANLEY H. BROWN,

Assistant U. S. Attorney.

[Endorsed]: Filed April 2, 1955.

[Title of District Court and Cause.]

AMENDED INFORMATION FOR VIOLATION
OF SEC. 145(B), INTERNAL REVENUE
CODE OF 1939, TITLE 26, U.S.C. 145(B)

The United States Attorney Charges:

Count One

That on or about the 15th day of March, 1949, in the District of Nevada, Raymond Percifield, late of Rangely, Colorado, who, during the calendar year 1948 was married to Mossie Percifield (did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and

his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada at Reno, Nevada, false and fraudulent joint income tax returns on behalf of himself and his said wife), wherein it was stated in total that their net income for said calendar year was nil and that they had suffered a net loss for said calendar year of \$6,-415.71 and that the amount of tax due and owing thereon was nil, whereas he then and there well knew their joint net income for the said calendar year was the sum of \$13,637.78, upon which said joint net income there was owing to the United States of America an income tax of \$2,041.92.

Count Two

That on or about the 15th day of March, 1950, in the District of Nevada, Raymond Percifield, late of Rangely, Colorado, (did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return), wherein he stated that his net income for said calendar year was nil, that he had suffered a total net loss of \$3,923.07 for said calendar year and that the amount of tax due and owing thereon was nil, whereas he then and there well knew his net income for the said calendar year

was the sum of \$6,372.02, upon which said net income he owed to the United States of America an income tax of \$559.76.

FRANKLIN RITTENHOUSE,
United States Attorney;

By /s/ STANLEY H. BROWN,
Assistant U. S. Attorney.

Sec. 145(b), T. 26 U. S. Code, Internal Revenue Act of 1939.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five (5) years, or both, together with the costs of prosecution.

[Endorsed]: Filed August 17, 1955.

DEFENDANT'S OFFERED INSTRUCTIONS

You are instructed, ladies and gentlemen of the jury, that some evidence has been received as to the good character of the defendant. You will give to

this evidence of good character such weight as you think it is entitled to receive and if after a consideration of all the evidence, facts, and circumstances in the case, including the evidence of good character, you have a reasonable doubt as to whether the defendant is guilty or innocent, then it will be your duty to find the defendant not guilty.

Edgington v. U. S. 164 U. S. 361.

Given: No. 49.

Instruction B

You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the defendant on a given date, followed by proof of a greater net worth on a later date, does not mean that the difference between the two amounts is income.

See generally: Smith v. U. S. 348, U. S. 147.

Refused: Covered by No. 26 and No. 27.

Instruction C

Ladies and gentlemen of the jury it is my duty to say to you that the conclusion has been reached from experience that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth cases in

the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows: Take all of the assets of the taxpayer on a given date which would include all tangible property, cash on hand or in banks, securities, and accounts receivable from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of assets and liabilities and deduct the result thereof from the net worth at the beginning of the period, and the difference could be income but there may be sources which increase net worth that are not taxable and would not be considered income.

See generally: 99 L ed. 170.

Refused: Covered by No. 26 and No. 27.

Instruction D

In a prosecution for evasion of federal income taxes, the taxpayer's wilfulness is an element necessary for conviction; such wilfulness involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income.

See Headnote number 23:

Holland v. U. S. 99 L. ed. 154.

Spies v. U. S. 317, U. S. 492.

U. S. v. Lindstrom 222 Fed (2d) 761

(Decided June 3, 1955.)

Given as modified: No. 20.

Instruction E

In this case you are instructed that you ~~cannot~~ infer evil motive because of the failure of the defendant to make a full and complete disclosure to the government agents when asked as to his financial transactions.

U. S. v. Clark, 123 Fed. Supp. 608.

Given as modified: No. 38.

Instruction F

You are instructed that the filing of a return by defendant which understates his true income is unlawful only if made wilfully, with knowledge of its falseness and with intent to evade income taxes, and there is no presumption that may be drawn from the act itself, and both knowledge and wilfulness must be established by independent proof.

~~I will give an example of the application of this rule.~~

~~If a taxpayer honestly and in reality believes that he does not have to report income from a particular~~

~~source, although mistaken in this belief, he would not be guilty of the wilfull attempt to evade payment of income tax.~~

Lurding v. U. S. 179 F. (2d) 419.

Given as modified: No. 39.

Instruction G

Wilfully means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He [certainly] is not wilfull if he acts without the advice of a lawyer or accountant, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.

Gaut v. U. S. 184 Fed (2d) 284

cert. den. 340 U. S. 917, 95 L ed 662

71 S. Ct. 350, Reh. den. 340 U. S. 939

95 L ed 678. 71 S. Ct. 488

Given: No. 19.

[Endorsed]: Filed February 21, 1956.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled case, find the defendant, Raymond Percifield, is guilty as charged in the First Count of the Information; and is guilty as charged in the Second Count of the Information.

Dated this 21st day of February, 1956.

/s/ JACK FRANCOVICH,
Foreman.

[Endorsed]: Filed February 21, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant by and through his attorneys of record and moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in admitting plaintiff's Exhibit No. 32 in evidence in that there was no evidence adduced of any warning at the time of sign-

ing the said exhibit that it would be used against the defendant in the event of a criminal prosecution; that the testimony of James W. Bell showed that the affidavit was not freely and voluntarily given; that the affidavit includes income for the years 1948, 1949 and 1950 without any segregation whatsoever and as such was highly prejudicial to the defendant in that he was charged with violations only for the years 1948-1949.

5. The Court erred in charging the jury and in refusing to charge the jury as requested in the following respects:

(a) Instruction No. 8 as given by the Court is not the law, is argumentative, uncertain and misleading.

(b) Instruction No. 14 as given by the Court is indefinite, misleading and lays down a rule which would permit the conviction of the defendant of a felony under Section 145(b) on evidence proving or tending to prove a misdemeanor under Section 145(a).

(c) Instruction No. 17 as given by the Court permits conviction of the defendant under Section 145(b), which is a felony on proof of violation of Section 145(a), a misdemeanor, and does not require the wilful attempt to evade taxes to be proved by independent evidence.

(d) The Court erred in modifying defendant's requested Instruction "G" in that defendant's re-

requested instruction correctly stated the law and by the modification the request was rendered conflicting, indefinite and uncertain and emasculated the force and effect of the request.

(e) The Court erred in modifying defendant's requested Instruction "D" in that the modification nullifies the request and by the modification the independent evidence required to prove wilfulness in the request is nullified. The instruction as given does not require independent proof of wilfulness.

(f) Instruction No. 26 as given by the Court is not a correct statement of the law and is indefinite, confusing and misleading.

(g) Instruction No. 27 as given by the Court is not a correct statement of the law and is indefinite, uncertain and misleading.

(h) Instruction No. 29 as given by the Court is not a correct statement of the law and is not adjusted to the evidence in the case as the government proceeded in this case under the hybrid method and therefor is confusing and misleading.

(i) Instruction No. 37 as given by the Court is not adjusted to the evidence in the case, is misleading and allows the jury to convict on evidence establishing nothing more than a misdemeanor and is in conflict with the other instructions requiring proof by independent evidence of wilfulness and further is in conflict with Instruction No. 38.

(j) The Court erred in modifying defendant's requested Instruction "E" in that the modification

destroys the full force and effect of the request and is not adjusted to the evidence in the case and as modified is confusing and misleading.

(k) The Court erred in modifying defendant's requested Instruction "F" in that the modification eliminates as a defense a mistake in law as was contained in defendant's requested Instruction "F."

(l) The Court erred in refusing to give defendant's requested Instructions "B" and "C" in that they are correct statements of the law and are not covered by any other instructions.

6. That as to Count Two the government's computations are erroneous in that the evidence adduced by the government's witnesses was not given full force and effect and the computation as per the schedule attached hereto and made a part hereof there is shown to be no tax due and owing for the year 1949.

Dated this 23rd day of February, A.D. 1956.

LEO J. PUCCINELLI,

Suite 405, Henderson

Bank Bldg., Elko, Nevada;

WALTER H. ANDERSON,

By /s/ LEO J. PUCCINELLI,

One of the Attorneys for
Defendant.

[Endorsed]: Filed February 24, 1956.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

The defendant's motion for new trial came on this day for argument, Stanley H. Brown, Assistant United States Attorney, appearing for the government, and Walter H. Anderson and Leo J. Puccinelli, appearing for the defendant; and the matter being argued and submitted, and good cause appearing, it is

Ordered, that defendant's motion for new trial be, and the same hereby is, denied.

Dated at Carson City, Nevada, this 12th day of March, 1956.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed March 14, 1956.

United States District Court for the
District of Nevada

No. 12,822

UNITED STATES OF AMERICA,

vs.

RAYMOND PERCIFIELD.

JUDGMENT AND ORDER OF PROBATION

Viol. Sec. 145(b), Internal Revenue Code of 1939,
Title 26, U.S.C. 145(b)

On this 16th day of March, 1956, came the attorney for the government and the defendant appeared in person and with counsel, namely, Walter H. Anderson and Leo J. Puccinelli, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of

Count One

On or about the 15th day of March, 1949, in the District of Nevada, defendant named above, late of Rangely, Colorado, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada at Reno, Nevada, false and

fraudulent joint income tax returns on behalf of himself and his said wife.

Count Two

On or about the 15th day of March, 1950, in the District of Nevada, defendant named above, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return.

as charged in the Information and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is sentenced as follows:

Count One

The defendant is fined \$5,000.00 and sentenced to Three (3) Years imprisonment. It Is Ordered that the execution of the imprisonment portion of this sentence is suspended and the defendant is placed on probation for Three (3) Years from this date on the usual conditions of

probation. It Is Further Ordered that the defendant shall report to the Probation Officer on the 1st day of each month during the period of probation, first report is due April 1, 1956. It Is Further Ordered that the defendant shall not engage in or be concerned with any type of activity deemed to be illegal under the laws of any county or state in which he lives.

Count Two

The defendant is fined \$5,000.00 and sentenced to Three (3) Years imprisonment. It Is Ordered that the imprisonment portion of this sentence shall run concurrently with the imprisonment sentence imposed on Count 1. It Is Further Ordered that the execution of the imprisonment portion of this sentence is suspended and the defendant is placed on probation for Three (3) Years from this date under the same terms and conditions as outlined in Count 1 hereof. It Is Further Ordered that of the sum of \$10,000.00 Cash bail now on deposit herein, that the \$5,000.00 shown to have been deposited by defendant be now applied by the clerk on defendant's fine, and that defendant is granted 5 days from this date in which to obtain and file with the clerk authorization of W. D. Fortner to apply his \$5,000.00, now in the Registry Fund, on the defendant's fine.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a

law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise, the defendant may be brought before the Court for a violation of the Court's orders.

It Is Further Ordered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ JOHN R. ROSS,

United States District Judge.

[Seal] OLIVER F. PRATT,
Clerk.

[Endorsed]: Filed March 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Raymond Perci-field, Box 185 or c/o Ace High Club, Rangley, Colorado.

Name and address of appellant's attorney: Maurice J. Hindin, Esq., Suite 802, 6399 Wilshire Boulevard, Los Angeles 48, California.

Offense: Violation of Section 145(b), Internal Revenue Code of 1939 (26 U.S.C. 145(b)).

Concise statement of judgment, order and sentence: Judgment of conviction on two (2) counts

after jury trial was entered February 21, 1956. Thereafter, a motion for new trial was duly filed and heard and denied on March 12, 1956. The defendant was sentenced on March 16, 1956. The sentence as to Count 1 was a fine of \$5,000.00 and three-year imprisonment. Execution of the imprisonment was suspended and the defendant placed on probation for a term of three (3) years. Sentence on Count 2 was a fine of \$5,000.00 and three-year imprisonment to run concurrently with sentence given on Count 1. Execution of sentence was suspended and the defendant granted probation for three (3) years, probation period to be concurrent with probation period granted in Count 1.

That as a condition of probation defendant was required to pay the fine imposed by the Court as to each count prior to time allowed for appeal herein. That at the time required for payment of the fine, and at a time prior to filing this notice of appeal, defendant and appellant paid the aforesaid fines in full as a condition of the said judgment and order suspending sentence and placing this defendant on probation.

That as of the date of filing this appeal defendant is not committed to any institution.

I, the above-named defendant, Raymond Percifield, hereby appeal to the United States Court of Appeals, Ninth Circuit, from the judgment of conviction above designated, from the order of the Court denying defendant's motion for new trial,

and from the order and sentence of the Court imposed herein and from the whole of each judgment and order thereof.

Dated March 20, 1956.

/s/ RAYMOND PERCIFIELD,
Defendant and Appellant.

/s/ MAURICE J. HINDIN,
Attorney for Appellant.

[Endorsed]: Filed March 22, 1956.

In the United States District Court
for the District of Nevada

No. 12,822

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RAYMOND PERCIFIELD,
Defendant.

Before: Hon. John R. Ross, Judge.

TRANSCRIPT OF TESTIMONY

February 13 to 21, 1956, Incl.

Be It Remembered, that the above-entitled matter came on for trial before the Court, sitting with a jury, on Monday, the 13th of February, 1956, at Carson City, Nevada, the plaintiff being represented by Stanley H. Brown, Esq., Assistant United States

Attorney; Clyde R. Maxwell, Esq., Trial Counsel, Treasury Department; and the defendant being present in court with his attorneys, Leo J. Puccinelli, Esq., and Walter H. Anderson, Esq. The following proceedings were had:

On Tuesday, February 14, 1956, the jury and alternate juror were sworn. The rule was invoked and witnesses present were sworn and excluded from the courtroom. On stipulation between counsel it was agreed that James W. Bell and Forrest Calkins, witnesses for the government, and Robert S. Hermann, witness for the defendant, might remain in the courtroom during the trial. [1*]

It was stipulated and agreed between counsel for the plaintiff and defendant that the following plaintiff's exhibits be admitted in evidence:

1. Original income tax return of Raymond Percifield for 1948 filed at Reno, Nevada, for the Ace High Club.

2. Original 1948 income tax return of Raymond and Mossie Percifield, filed at Reno, Nevada, for the Nevada Club.

3. Original 1949 income tax return of Raymond Percifield, filed at Reno, Nevada.

4. Certificate of assessment and payment, that is, transcript of the records of the Collector of Internal Revenue, relative to the place the 1948 income tax returns were filed and showing amount of tax, if any, assessed thereon.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

5. Certificate of assessments and payment as to Raymond and Mossie Percifield, for 1949, that is, transcript of Collector's records for income tax paid for that year.

6. Certificate of assessments and payments for 1948 and 1949, being a transcript of the Collector's records at Denver, Colorado, as to Raymond and Mossie Percifield.

7. Deposit slips for Ace High Club account with First State Bank of Rangely, Colorado, for 1948.

8. Deposit slips for Ace High Club account at First State Bank at Rangely for 1949.

9. Photostats and true copies of the records of the First State Bank at Rangely, as to account in name of Raymond and Mossie Percifield and Ace High Club for 1948 and 1949; also ledger sheets of that account.

10. True and correct copies of Findings of Fact and Conclusions of Law in the case of William H. Bacon and wife and R. W. Jackson and wife vs. Raymond Percifield and Mossie Percifield, filed in the District Court of Elko, Nevada. [2]

11. True and correct copy of note for \$11,000 dated Wendover, Nevada, September 26, 1957, referred to in Findings of Fact in Exhibit 10.

12. Photostat copies of 4 checks, referred to in Exhibit 10.

J. LESLIE CARTER

a witness on behalf of the government, having been duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. What is your name, sir?

A. J. Leslie Carter.

Q. And where do you reside?

A. Elko, Nevada.

Q. What is your occupation, sir?

A. Banker.

Q. For what bank?

A. Nevada Bank of Commerce, Elko.

Q. That is the Elko branch?

A. Elko branch.

Q. Now, you were requested to bring certain records of the Elko branch of the Nevada Bank of Commerce, and I believe those records were handed to me prior to the start of this proceeding?

A. Yes, sir.

Q. I wonder if you could tell me just what this first record is?

A. These are deposit slips of Raymond Percifield of Wendover, Utah, during the years 1947, '48, and some of '49.

Q. Are they all the deposit slips for the year 1947, or just the last month of 1947? [3]

A. Just the last month of '47.

Mr. Maxwell: I will offer the document referred

(Testimony of J. Leslie Carter.)

to by the witness into evidence. I think perhaps the clerk should mark that for identification.

The Court: Will you mark the offer for identification.

Mr. Maxwell: If satisfactory with counsel, while they are examining that, I will secure other documents for identification and you then can examine all three documents.

Mr. Anderson: That is all right.

Q. Did you also bring signature card for that account, sir?

A. Yes, sir, I have the signature card.

Mr. Maxwell: I will ask the clerk to mark the signature card for identification.

Q. And did you bring ledger sheets for the bank account, sir?

A. I have certified copies of ledger sheets here.

Q. And you have compared those with your copies of ledger sheets? A. I have.

Q. To what period do those relate?

A. They start in December, '47, and run right on through to '49, to September.

Mr. Maxwell: The clerk will mark the ledger sheets for identification.

Q. Did you also bring with you certain liability ledger sheets? A. Yes, sir.

Q. And to what period does that relate, sir? [4]

A. That is August 31, 1948, to November 17, 1949.

Q. I believe the bottom sheet also refers to June 5, 1948, does it not? A. That is right.

(Testimony of J. Leslie Carter.)

Mr. Maxwell: I ask the clerk to mark these liability ledger sheets as government's next in order.

The Clerk: 16.

Mr. Maxwell: I will offer Plaintiff's Exhibit No. 13 for Identification, being the deposit slips in the account of Raymond Percifield at the Nevada Bank of Commerce at Elko.

Mr. Puccinelli: No objection.

The Court: They may be received in evidence and marked Government's Exhibit 13.

Mr. Maxwell: I will offer Plaintiff's Exhibit No. 15 for Identification into evidence, being certified copies of the ledger sheets of the bank account of Raymond Percifield, Nevada Bank of Commerce, Elko, Nevada, Elko branch.

Mr. Puccinelli: No objection.

The Court: The offer will be received in evidence as Government's Exhibit No. 15.

Mr. Maxwell: There was the signature card, No. 14 for Identification, we have determined not to offer in evidence at this time. I will offer Plaintiff's Exhibit No. 16 for Identification in evidence, it being liability ledger sheets of Raymond Percifield's account with the Elko branch of the Nevada [5] Bank of Commerce at Elko. The period runs from April 10 to June 5, 1948, to the last date, December 17, 1949.

Mr. Puccinelli: No objection.

The Court: The offer is received in evidence and marked Government's Exhibit No. 16.

Q. Mr. Carter, I will hand you Exhibit 16 in

(Testimony of J. Leslie Carter.)

evidence, which has been identified as liability ledger sheets. Would you explain what a liability ledger sheet is?

A. Well, when a person is given a loan, they sign a note and the note is kept track of on a liability ledger sheet.

Q. His payments and interest, etc., are all recorded on the card? A. That is right.

Q. I wonder if you could tell us then what this exhibit reflects, just briefly?

A. Well, it reflects that on June 5, 1948, or April 10, 1948, there was a loan balance of a thousand dollars and on June 5, it tells me that the thousand dollars was renewed and the interest paid at that time and it went on and the note was renewed three consecutive times and then there was \$500 paid on the note and the balance was paid on the note, \$500, December 17, 1949.

Q. I think perhaps you are mistaken as to the loan payment on December 6, 1948. Wasn't there another loan made in 1949?

A. No, there was not.

The Court: I understand, then, that this exhibit shows [6] the history of the payment of principal and interest on a thousand dollar loan, which is indicated in the beginning of that history?

A. That's right.

Q. Which is finally paid off on December 17, 1949? A. Yes, sir.

Mr. Maxwell: I have no further questions.

(Testimony of J. Leslie Carter.)

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Carter, we want to clarify the record we heretofore made and in Plaintiff's Exhibit 16, the opening entry is a thousand dollars on April 10, 1948, is that correct?

A. Yes. That was probably carried forward from a previous loan, if you had the entire ledger sheet.

Q. Now, Mr. Carter, what is the entry as to June 5, 1948? A. Interest.

Q. And what else?

A. A payment of the principal.

Q. Of how much?

A. A thousand dollars.

Q. What is the balance then as of the close of business on June 5, 1948? A. Zero.

Q. Nothing, right? A. Right.

Q. And now in going to the next page, we have what; on the opening [7] entry?

A. A thousand dollar loan on the 31st of August.

Q. Therefore, that can't be the same thousand dollars, can it? A. Certainly not.

Q. That reflects two different one thousand dollar loans? A. Right.

Mr. Puccinelli: I think that is all.

Mr. Maxwell: I have nothing further at this time.

(Witness excused.)

CLIFFORD C. WHITE

having been duly sworn, testified on behalf of the government as follows:

Direct Examination

By Mr. Brown:

Q. Mr. White, for the purpose of the record, would you state your full name?

A. Clifford C. White.

Q. And you have been previously sworn in this matter, have you not? A. Yes, sir.

Q. Where do you reside?

A. Topeka, Kansas.

Q. You have resided there how long?

A. I went back there in the spring of '52.

Q. Where did you reside prior to that time?

A. Gillette, Wyoming.

Q. You appear in court today pursuant to a subpoena, do you not? [8] A. Yes, sir.

Q. And did you bring certain documents with you, also listed on the subpoena?

A. I have all the documents I have, yes, sir.

Q. I wonder if you would produce them, please? Mr. White, are you acquainted with Mr. Raymond Percifield? A. Yes, sir.

Q. Approximately how long have you known him?

A. Oh, I knew him casually prior to '36; about in '36 I became very well acquainted with him.

Q. You do not bear any relationship to him?

A. No, sir.

Q. You recognize him here in court today, do

(Testimony of Clifford C. White.)

you not? A. Yes, sir.

Q. Now, inviting your attention to the summer of 1948, did you have any financial transaction with Mr. Percifield? A. Yes, sir.

Q. Would you kindly explain to the jury and Court just exactly what that transaction was?

A. I loaned him \$2,500.

Q. Now, you have handed me what purports to be a promissory note, executed by Raymond Percifield on July 14, 1948, payable to Clifford C. White, in the amount of \$2,500. Is that sheet evidence of that indebtedness? A. Yes, sir. [9]

Mr. Brown: We would like this marked for identification, plaintiff's next in order.

The Clerk: No. 17.

Q. Now, did you receive any payment on the principal, any reduction of that indebtedness, in the year 1948? Were you paid anything on the principal?

A. Was I paid anything on the principal?

Q. That is correct. A. No, sir.

Q. Did you receive any payment on the principal in the year 1949? A. No, sir.

Q. Now, with regard to the interest, did you receive any interest payment in the year 1948?

A. Well, the interest that I received is down here and I hardly think I did in 1948, sir.

Q. Did you receive any interest in 1949?

A. Well—yes, I did.

Q. How much? A. Seventy-five dollars.

Q. Is that reflected on the reverse of that note?

(Testimony of Clifford C. White.)

A. Yes, sir.

Mr. Brown: We offer the note in evidence, your Honor, as Government's Exhibit 17.

Mr. Anderson: No objection to the offer. [10]

The Court: The offer will be received in evidence as Government's Exhibit 17.

Mr. Brown: You may examine.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. White, I take it, then, from your testimony, that nothing was paid on the principal to you during the years 1948 or 1949? A. No, sir.

Q. I take it your testimony is to the effect that as to the end of 1949 the amount owing to you by Mr. Percifield was \$2,500? A. Yes, sir.

Q. In other words, the face of the note?

A. Yes, sir.

Q. How much does he owe at the present time?

Mr. Brown: We object. There is nothing in issue as to what the indebtedness of the defendant might be at the present time. We are interested in his financial status as of 1948 and 1949 only.

Mr. Puccinelli: Your Honor please, it is our intent to show, among other things——

Mr. Brown: If you are going to make an offer of proof, I suggest that the jury be excused.

The Court: Objection sustained.

Mr. Puccinelli: That will be all.

(Witness excused.) [11]

CORA CRAFT

a witness on behalf of the government, having been duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, Mrs. Craft, would you state your full name?

A. Cora Craft.

Q. You have been previously sworn in this matter, have you not? A. Yes, sir.

Q. Mrs. Craft, where do you reside?

A. Rapid City, South Dakota.

Q. How long have you resided there?

A. About five years.

Q. Your occupation is housewife, is it not?

A. Motel operator.

Q. You appear to testify pursuant to a subpoena caused to be issued by the United States?

A. Yes.

Q. Do you bear any relationship to the defendant, Raymond Percifield?

A. He is my brother-in-law.

Q. He married your sister, is that correct?

A. Yes.

Q. Where did you reside in 1948?

A. Wendover, Utah.

Q. By whom was your husband employed in 1948? [12] A. Raymond Percifield.

Q. In what capacity? A. Bartender.

Q. Now, did you have any transactions with the Percifields in 1948, any financial transactions?

(Testimony of Cora Craft.)

A. With Mossie Percifield.

Q. That is your sister? A. Yes.

Q. Would you explain to the Court and jury just exactly of what that transaction consisted?

A. Well, I loaned her \$3,500.

Q. Now, did you have any understanding as to the purpose of that loan?

A. I think it was to pay a mortgage and payment for something pertaining to the loan.

Q. When you say you think it was payment pertaining to a loan, could you explain more fully?

A. Well, it was an obligation that they had to meet.

Q. When you say "they," to whom do you refer?

A. Well, she and her husband.

Q. And do you recall exactly how that money was paid to Mossie Percifield, whether check or cash?

A. No, it was in cash.

Q. Do you recall if you took a note?

A. She gave me a receipt, made out a receipt. [13]

Q. Did you bring that with you?

A. Yes, I have it.

Q. I wonder if I could see it? A. Yes.

Mr. Brown: I would like to have this marked for identification, Plaintiff's Exhibit No. 18, receipt signed by Mossie Percifield, which indicates on its face receipt of \$3,500 loan, dated September 26, 1948.

Q. Now, referring to Plaintiff's Exhibit No. 18 for identification, which is the receipt you gave me,

(Testimony of Cora Craft.)

Mrs. Craft, is that the only evidence of indebtedness that you received? A. Yes, it is.

Mr. Brown: We offer this in evidence as Plaintiff's Exhibit No. 18.

Mr. Puccinelli: No objection.

The Court: Being no objection, the offer is received in evidence as Government's Exhibit 18.

Q. Now, I ask you if you received any payment on the principal, that is, the \$3,500, reduction of that amount, in the years 1948 or 1949?

A. No, I didn't.

Q. Did you receive any payment of interest in 1948 or 1949? A. No.

Q. Did you have an understanding with Mrs. Percifield or Mr. Percifield, regarding the rate of interest the obligation was to bear? [14]

A. No.

Q. You had no understanding as to interest?

A. None.

Mr. Brown: You may examine.

Mr. Anderson: There is a matter that we want to take up with the Court in connection with the examination, particularly the question asked Mr. White, and we have the same question here of this witness, that as to the present status of this obligation. That might become a very vital issue in this case, as I understand the situation. We would be glad to go into it any time, but we would like to hold Mr. White until that is disposed of.

Mr. Maxwell: I can't see any possible relevancy as to that testimony.

The Court: We will decide this matter now.

(Jury admonished and excused at 2:50 until 3:15 p.m.)

In the Absence of the Jury

The Court: Now, gentlemen, this case involves two counts, for the years 1948 and 1949, and in connection with the transactions between the defendant and certain of these witnesses, wherein it is shown that the indebtedness existed during the years 1948 and '49 between defendant and the witness, defendant's counsel has asked that one of the witnesses what the status of that obligation was at the present time. There was an objection made to that and the Court sustained the objection. Counsel [15] for the defendant have pointed out that similar questions will be asked of other witnesses and indicates they would like to present their views to the Court. Very well.

Mr. Puccinelli: If I may point out to the Court first of all it is unfortunate that my question was the status of the obligation as of this date. The question should have been, and will be in the future, if permitted to be asked, what was the status of the obligation as of the end of 1950? The purpose of that, your Honor please, it is my understanding that any losses made or sustained by the taxpayer in a given year must be carried back before they can be carried forward. If my understanding on that is correct, then this would be very material and vital as to the status of those obligations in 1950, tending

to show that the losses sustained by the defendant might be taken and applied to those years as we requested, and it is for that reason, your Honor, please, that we submit that those questions are relevant and proper.

The Court: Counsel, I assume from your restatement of your question at the present time, that the question you asked the witness, and which the Court ruled upon was properly ruled?

Mr. Puccinelli: In the manner it was presented, yes.

Mr. Maxwell: If the Court please, assuming that the Court desires to accept the question will be properly asked as to [16] losses sustained during the year 1950, I would like to point out to the Court that one never sustains a loss for the year on taxable income until the end of the year. What the defendant may have found out subsequent to December 31, 1950, as to a loss for the year 1950 would hardly have any effect on income tax return that he was required to file on March 15, 1950. Obviously, he could not have known about his 1950 loss at that time, because he would be only less than one-quarter through the year. Secondly, the true tax owing to the government on March 15, 1950, on account of 1949 taxes, would be the full amount, undiminished by carried-back losses. Now that has been held in the case of *In re—187 Fed(a), 62, Ninth Circuit case.* (Reads): Furthermore, another principle of law involved here would be the carry-back of liabilities, losses. *Skeels vs. U. S., 95 Fed. Suppl., 292.* (Reads.)

The Court: This is a splendid opportunity for the Court to become instructed on the intricacies of tax work. The defendant is charged with evading taxes for 1948 and 1949. Assume, during that period I borrowed five thousand dollars from the bank and I did or did not pay any of it off. Now that was the line of questioning being asked of this witness. Now I can see that somewhere what was done during the discussed period is important and I can anticipate what it will lead up to, but whether or not I owed anything to my creditor, [17] to the bank, in the subsequent year, is something that I can't relate to the charges made. How would it affect me? Where would it reflect?

Mr. Puccinelli: In this manner, your Honor please, a person engaged in a particular type of business, or knowing his business well, can, I think, have his thumb on the pulse of that particular business better than some one looking on from the outside. If a person, by March 15th, has already sustained a loss and knows, and firmly believes, he is going to have a bad year, that is entirely within his scope of knowledge.

The Court: How can you bring that out by a question to a witness to whom certain money is owed by the defendant on a straight loan?

Mr. Puccinelli: By this manner, if your Honor please, we are trying to show that there has been a long period of time here in which the defendant has actually not been making money.

The Court: I see, and that these loans are being made to sustain his losses?

Mr. Puccinelli: That is right.

Mr. Brown: Your Honor please, the question is whether he attempted to evade and defeat his taxes for that particular year. If he had the intent at the time that was filed, that is sufficient. Now how could he look forward for a year or two years and tell whether or not he was going to sustain a loss?

The Court: In any event, I will rule it out.

(Recess taken at 3:00 o'clock.) [18]

3:15 P.M.

Defendant present with counsel.

Presence of the jury stipulated.

The Court: Gentlemen, we had some discussion concerning the type of question asked and there need be no point on the question addressed to the first witness because it was addressed as to the status at the present time. I feel that the question asked does not come properly under the head of cross-examination, but by the same token I believe it is admissible under the defendant's case and he can either make this witness, or any other witness, his own on that type of question or to save time we might concede that it be asked on cross-examination. Now this question is confined, as I understand it, to the year in which the return is made physically.

Mr. Puccinelli: Yes.

MRS. CORA CRAFT

resumes the witness stand on

Cross-Examination

By Mr. Anderson:

Mr. Brown: Excuse me, I believe the witness should be subjected to only one examiner.

Mr. Anderson: I concede that, but Mr. Puccinelli said he hadn't asked any questions.

Mr. Brown: Oh, excuse me. [19]

The Court: It is customary for one attorney to handle one phase of the case. Very well, Mr. Anderson.

Q. Mrs. Craft, I will ask you how much Mr. and Mrs. Percifield owed you of this \$3,500 at the end of 1950? A. \$3,500.

Mr. Anderson: That is all.

(Witness excused.)

E. JOSEPH WINDER

having been duly sworn, testified on behalf of the government as follows:

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, state your full name, please. A. E. Joseph Winder.

Q. Mr. Winder, where do you reside?

A. Vernal, Utah.

Q. You have been previously sworn in this matter, have you not? A. Yes, sir.

(Testimony of E. Joseph Winder.)

Q. How long have you resided in Vernal?

A. Practically all my life.

Q. What is your occupation or profession?

A. I am a bookkeeper.

Q. You appear here today pursuant to federal subpoena, do you not? A. Yes, sir.

Q. You were requested to bring certain records with you, is [20] that correct? A. Yes, sir.

Q. And you have them in your possession?

A. Yes, sir.

Q. Do you know Raymond Percifield?

A. Yes, sir.

Q. Do you see him here in court? Do you recognize him? A. Yes, sir.

Q. Where were you employed, sir, in 1949?

A. At the Vernal Motor Sales.

Q. Are you presently employed there?

A. Yes, sir.

Q. In what capacity? A. Bookkeeper.

Q. And were you the bookkeeper for the year 1949? A. Yes, sir.

Q. Briefly, what do your duties consist of?

A. Making entries of sales and disbursements involved, records, submitting reports.

Q. Now, Vernal Motor Sales, what type of business is that?

A. It is a garage, where they sell Buick cars.

Q. Now you, as bookkeeper, were familiar with the books and records kept by the Vernal Motor Sales, isn't that correct? A. Yes, sir.

(Testimony of E. Joseph Winder.)

Q. Those records are available to you, is that correct? [21]

Q. Was it customary in that business to keep either the original or copies of invoices or contracts of clients, contracts relative to the sales of motor vehicles in 1949?

A. It is customary to keep the original of invoices and duplicate of contracts.

Q. Now, inviting your attention to the year 1949, do you have in your possession a car invoice reflecting the sale of an automobile to Raymond Percifield?

A. Yes, sir.

Q. Kindly refer to it if you have it. Does that reflect the sale of a Buick automobile?

A. Yes, sir.

Q. On what date?

A. The contract does not have the date of sale—I should say the invoice does not have the date of sale. The contract shows it was sold the 10th of November, 1949.

Q. What was the make of the automobile?

A. Buick.

Q. What was the price of the automobile?

A. Cash delivered price was \$3,109.80.

Q. Can you tell the Court and jury what that cost includes?

A. Well, the car is priced at \$2,430; transportation \$232, excise tax \$138, and the equipment, consisting of radio \$89.50, heater at \$64.80, whitewall tires \$25.30, seat trim \$52.70, turn lights \$17.50, anti-freeze, two and one-half gallons, \$9.00, water

(Testimony of E. Joseph Winder.)

pump \$1.00, total \$259.80, delivery service was [22] fifty.

Q. And that total cash price is \$3,109.80, is that the figure you testified to? A. Yes, sir.

Q. Now, was there any cash paid on that transaction?

A. Yes, Mr. Percifield gave us his check in the amount of \$448.25.

Q. Was there a turn-in allowance?

A. Yes, sir. He traded in a car, on which we allowed \$609.80.

Q. Do you recall what kind of a car?

A. That was a '46 Buick.

Q. Now, General Motors Acceptance Corporation handles the financing of General Motors cars, is that correct? A. That is right.

Q. Was General Motors Acceptance Corporation involved in this transaction?

A. Yes, we submitted the contract to them for the balance of this purchase price, after deducting the down payment.

Q. What was the total time price?

A. Total time price was \$3,461.87.

Q. What was that figure? A. \$3,461.87.

Q. \$3,461.87? A. Yes, sir.

Q. Now, with reference to the cash, was that payment made by [23] check, do you recall, or was it made by cash; that is, with reference to the amount of money paid by the purchaser, Mr. Percifield?

(Testimony of E. Joseph Winder.)

A. The payment was made by a check.

Q. Did that check clear?

A. No, the check did not clear the bank at the time it was submitted.

Q. Was the down payment made good before the end of 1949? A. Yes, sir.

Q. Do you recall how, or under what circumstances?

A. Well, I know it was redeemed near the end of November, as I recall, by a payment of cash.

Mr. Brown: You may examine.

Mr. Anderson: We would like to see that bill of sale before we let him go. I don't know if we will want him any more than just see it.

Mr. Anderson: Then we will ask him one question.

Cross-Examination

By Mr. Anderson:

Q. The figures you gave, and the evidence you gave, these are all in writing, are they not?

A. Yes, sir.

Q. And you testified from records?

A. Yes, sir. [24]

Q. Could you give that evidence if you did not have the records? From memory? Could you give that evidence from your memory of the transaction?

A. Well, I remember about the sale, but the exact figures I wouldn't have in my memory, no.

Q. You couldn't give them from memory?

(Testimony of E. Joseph Winder.)

A. No.

Q. And you testified from the record you have here?

A. Yes, sir.

Mr. Anderson: In view of that, we move the evidence be stricken because he admitted he is testifying from records and they are not in evidence and he can't testify from memory.

Mr. Brown: I think the motion to strike is certainly untimely. It has been repeatedly upheld by the State of Nevada that a party cannot stand and listen to testimony and then determine whether or not to strike. He should have interposed his objection when I started to examine the witness. There is an additional argument here that he testified he was the bookkeeper and exactly of what his duties consisted. Secondly, it would be a question of refreshing his memory from his books. Nobody can carry these figures around in their head.

The Court: The Court will permit the government to present a little more foundation as to these records from which he testified. [25]

Examination

By Mr. Brown:

Q. Were the records from which you testified kept in the ordinary course of business?

A. Yes.

Q. They were kept by you? A. Yes.

Q. Is it customary, in a business of this nature, to keep records of the type of which you have testified?

A. Yes, sir.

(Testimony of E. Joseph Winder.)

Q. They have been in your custody for how many years?

A. Well, ever since 1949, when the car was bought.

Q. Were the entries made in the records from which you testified your entries?

A. Yes, they are all my entries.

Q. Made at the time of the transactions?

A. Yes, sir.

The Court: Counsel, does this witness have the documents from which he testified?

Mr. Brown: If they want the records—yes, sir, they are in front of him.

The Court: I think the witness has said, in answer to Mr. Anderson, that he couldn't testify from recollection and unless his recollection is refreshed. I think under the circumstances the records should be in evidence. [26]

Mr. Brown: We have no objection.

The Court: I see your point, Counsel. Or if not in evidence, at least they have a right to examine as indicated. Mr. Anderson has a right to look at them.

Cross-Examination

(Continued)

By Mr. Anderson:

Q. Can you tell us what date the check was taken but that was returned for insufficient funds?

A. Well, I believe it was the 29th of November.

Q. What year? A. 1949.

(Testimony of E. Joseph Winder.)

Mr. Anderson: Your Honor please, we would like to have these two documents that the witness produced, one of which is title mortgage and the other this invoice, we would like to have them marked and like to introduce them in evidence.

Mr. Brown: We have no objection.

The Court: Very well. The two documents tendered on the part of the defendant will be received in evidence and marked defendant's Exhibits A and B, invoice A and title mortgage B.

Mr. Anderson: We offer them in evidence as part of the cross-examination of this witness.

The Court: So received.

Mr. Anderson: That is all, your Honor.

(Witness excused.) [27]

DONALD OAKLEY

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. State your name, please.

A. Donald Oakley.

Q. Where do you reside, Mr. Oakley?

A. Reno.

Q. What is your occupation?

A. District Representative for the General Motors Acceptance Corporation.

(Testimony of Donald Oakley.)

Q. And as such representative, you have in your care, custody, and control, their records?

A. To some degree, yes.

Q. You have been subpoenaed here to bring General Motors Acceptance Corporation's records of sale of 1949 Buick to Raymond Percifield, and a contract thereon. Did you bring those records?

A. I have the branch record cards.

Q. Do those records show the amount owed by Raymond Percifield to General Motors Acceptance Corporation as of December 31, 1949?

A. They do.

Q. And what is that amount, sir?

Mr. Anderson: We object to it, because it is evidently in the record and the record is not in evidence.

Mr. Maxwell: I will put the record in evidence and have him read it in the record; I don't see that it makes a bit of difference—if that is the way counsel desire it. [28]

The Court: Put it in, counsel. Let us get along.

Q. This is your branch record, I believe you testified?

A. Yes, sir.

Q. And it shows the payments on this account for the year 1949 and the balance due at the end of the year 1949?

A. Yes.

Mr. Maxwell: May it please the Court, we will offer that document as government's next in order, only as to an item showing the balance of the defendant's account with General Motors Acceptance Corporation at the end of the year 1949.

(Testimony of Donald Oakley.)

Mr. Anderson: We submit if it goes in, it should go in for what it is worth. I may have seen this or not, I don't know.

The Court: Take a look at it.

Mr. Maxwell: I am sure you have, counsel. I showed it to you Tuesday.

Mr. Anderson: We object to it going in at all, unless it goes in for what it shows.

The Court: May the Court see it? These payments all concern this same transaction?

A. That's right.

The Court: I think the objection to the offer is good, and I think if it goes in, it should go in for its face value. It concerns this one transaction only. I observe, counsel, that some of these payments are much later than 1948 and '49. [29]

Mr. Maxwell: Yes, your Honor, I have no objection to the exhibit going in as to full face value as to amounts either due at, or paid during the year 1949. 1950, '51, '52 and '53, or whatever subsequent dates are on there, I do not believe the exhibit is material or relevant.

Mr. Anderson: We do not think they can split an exhibit up and put in a single item and keep the rest from the jury.

The Court: Of course, you are well aware of the fact the jury can be instructed as to the purpose for which testimony is received.

Mr. Anderson: Yes, that is true. And we suggest that the exhibit go in for what it shows on its face, at least up until the end of 1950.

(Testimony of Donald Oakley.)

The Court: Well, that will be the ruling of the Court. This exhibit shows payments made through the calendar year 1950 and the exhibit for that purpose will be admitted as government's Exhibit 19.

Q. Showing you plaintiff's Exhibit No. 19, I wonder if you would read the balance due by the defendant to the General Motors Acceptance Corporation on December 31, 1949? A. \$2,249.67.

Q. There was no balance due on December 31, 1948, of course? A. That's right.

Mr. Maxwell: That will be all. [30]

Cross-Examination

By Mr. Anderson:

Q. On the left-hand side of this exhibit there are some figures, amounts there. What do they represent?

Mr. Maxwell: Just a minute—I object to any testimony with respect to those items unless they are shown to be within the period restricted to the Court's ruling.

Mr. Anderson: The exhibit, I believe, shows what they are. I will ask the witness a question. I first ask what they are. I think I can ask that much.

A. Those represent a shortage which was caused by a check returned by the bank.

Q. Up to what date did that cover?

A. That was covered after the year 1949.

Q. And in the year 1950? A. Yes.

(Testimony of Donald Oakley.)

Q. Was more than one check returned?

A. Yes, sir.

Q. How many in the year 1950?

A. There was a total of four checks, which could be two checks redeposited.

Q. Do you know whether that is the case or not?

A. No, sir, I do not.

Q. And what was the amount of the first check that was returned? A. \$134.09.

Q. Do you know how that was paid? [31]

A. No, sir, I do not.

Q. Has it been paid? A. Yes, sir.

Q. Do you know whether the second check was \$268.18?

A. I could tell from the dates here, sir.

Q. Very well, if you can tell.

A. Well, sir, it was evidently two checks that totalled \$268.18.

Q. Were they both returned, or was only one check? A. It is evidently two checks.

Q. Were more than these two checks returned in the year 1950?

A. There was a total of four checks deposited. I cannot say whether it was two checks or three checks or four checks.

Mr. Anderson: That is all.

Redirect Examination

By Mr. Maxwell:

Q. Those checks were all paid?

A. Yes, sir.

(Testimony of Donald Oakley.)

Q. Were they paid during the year 1950?

A. That's right.

Mr. Maxwell: That's all.

(Witness excused.) [32]

JENNIE ROSA

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name please?

A. Jennie E. Rosa.

Q. Where do you reside?

A. Glenwood Springs, Colorado.

Q. What is your occupation?

A. I am vice-president of the First National Bank of Glenwood.

Q. And in that capacity do you have the car, custody and control of records of that bank?

A. Yes.

Q. You were subpoenaed to bring with you certain documents. Did you bring those documents with you today?

A. Yes, sir.

Q. For the purpose of identification, will you state what this document is, please?

A. It is a note from Raymond Percifield to Joe Rosa.

Q. What is the date?

A. October 1, 1947.

Q. This is a photostat copy of such note, is it?

(Testimony of Jennie Rosa.)

A. Yes.

Q. Have you compared this copy with the original? A. Yes.

Q. As a matter of fact, the photostat bears that certification [33] on top it is a true copy?

A. Yes, it does.

Mr. Maxwell: I ask it be marked for identification.

The Court: It may be so marked.

The Clerk: No. 20 for identification.

Q. Do you know where the original of this photostat is?

A. The original has been returned to Mr. Percifield.

Q. This is Mr. Percifield here—do you know him?

A. Yes, I have just seen him a couple of times.

Mr. Maxwell: I will offer Exhibit 20 for identification in evidence, only as to the amount of payments on the face and the note itself to and including the period December 31, 1949.

Mr. Anderson: We object to this as incompetent, immaterial and irrelevant and not the best evidence.

Mr. Maxwell: If the Court please, I believe Miss Rosa testified first of all she had compared this with the original and it is a true copy, and, second, the original has been returned to the defendant.

The Court: That is correct. If you want to make demand on the defendant.

Mr. Anderson: It is our contention he can't

(Testimony of Jennie Rosa.)

make a demand on the defendant to produce something until he is our witness on the stand.

The Court: I believe you are right, but at least the original is in the defendant's possession and this [34] is a certified copy and if the government can distinguish anything wrong as to what is now offered as the best evidence——

Mr. Anderson: I just want to point out I don't think there is any authority in law for a bank to make a certified copy.

The Court: There may not be. I don't think there is much authority in law for any one to make a certified copy and yet they do. Where do we stand now?

Mr. Maxwell: This offer, your Honor, this note, together with the payments thereon for the period, date of October 1, 1947, to and including December 1, 1949.

Mr. Anderson: We make the further objection, if they are going to offer it at all, they should offer it for what it shows.

The Court: May I see the offer?

Mr. Maxwell: Yes, your Honor.

The Court: The Court feels that the same years should be taken on this as to the year in which the last tax return was made; in short, it was made for 1949 in 1950 and the Court feels that the offer, if it is to be restricted, should include the year 1950.

Mr. Maxwell: Very well.

The Court: With that restriction, counsel, are you—— [35]

(Testimony of Jennie Rosa.)

Mr. Anderson: As far as that part of it is concerned, that is all right.

The Court: Very well. The offer will be received in evidence as government's Exhibit No. 20 and, Mr. Clerk, you will be directed to cover that portion of the exhibit concerned with the more recent years.

Mr. Maxwell: May I suggest the last page shows entirely later years, and that may be detached?

The Court: Do you consent to the last page being detached, which concerns, which concerns itself with 1952, 1953 and 1954?

Mr. Anderson: Yes, that is all right.

The Court: Then, Mr. Clerk, you will cover the first page in the manner indicated by the Court. I hand back to you, counsel, page 2, this being detached as stipulated to may be subtracted from the original offer.

Q. Now, showing you Exhibit 20, Miss Rosa, can you read there the amount of the note?

A. You want me to read?

Q. Yes, would you tell me what the amount of the note is? A. Fifty-five thousand.

Q. I notice in the body of the note it says fifty thousand. Can you look at the payments below the note and tell me which the parties treated it, as fifty thousand or fifty-five thousand? [36]

A. Fifty-five thousand.

Mr. Maxwell: We have no further questions.

(Testimony of Jennie Rosa.)

Cross-Examination

By Mr. Anderson:

Q. Miss Rosa, you say that you returned the original of that note to Mr. Percifield?

A. Yes, I believe so.

Q. Did you do it?

A. No, I did not. It was another employee at the bank.

Q. How do you know that?

A. Well, it is part of our files.

Q. How do you know another employee of the bank returned it?

A. Well, I have this to show, where the last payment was made.

Q. I want to know if you, yourself, returned it?

A. No, I didn't myself return it.

Mr. Maxwell: Do you know it was returned?

A. Yes, I do.

Mr. Maxwell: You know that?

A. Yes.

Q. (By Mr. Anderson): How do you know it?

A. Well, due to the fact it isn't in our files yet.

Q. Is that the only way you know it?

A. No, I can show you by this.

Mr. Maxwell: May the document that the witness is showing counsel be marked for identification?

The Court: Yes, it will be so marked.

The Clerk: No. 21 for identification. [37]

(Testimony of Jennie Rosa.)

Redirect Examination

By Mr. Maxwell:

Q. Miss Rosa, you say this document, having been signed by Mr. Percifield, referring to Exhibit 21 for identification, establishes, as a part of your file, that the original note and assignment were returned to the defendant. I wonder if you would explain that? A. Why?

Q. Yes.

A. Well, we have a regular stamp, "Paid," and the date and releases the bank from all responsibility after he paid this note.

Q. And at that time does the bank return all of the original notes and agreements in escrow file? A. That is correct.

Q. So that this note, then, would have been returned at the time that was signed, is that correct?

A. That is correct. That stamp releases the bank of all responsibility.

Q. What is the date of that?

A. October 4, 1950.

Q. Now, you are referring to what page of Exhibit 21 for identification?

A. The last page.

Q. It is the third page?

A. Third page, that is correct.

Q. And it is on the bottom of that page to the left? [38] A. That is right.

Mr. Maxwell: Now, if the Court please, I will offer the bottom of the third page of Exhibit 21 for identification in evidence.

(Testimony of Jennie Rosa.)

Mr. Anderson: May I take it a moment? May we ask a question on the balance of this document?

Q. (By Mr. Anderson): Are the next two pages attached to this paper part of this same transaction or not, the next two sheets? Do they relate to that same transaction? A. Yes.

Q. Are they part of the same transaction?

A. Yes, the same transaction, that is correct.

Mr. Anderson: If the Court please, the last two pages that we inquired about of this witness on cross-examination are for the year 1950 and we think they should go in, too.

The Court: Now, we have introduced here a certified photostat of a note. Now that served a purpose. Now it appears to me that we are just moving away from the main picture with this sort of discussion. Maybe I am wrong.

Mr. Maxwell: With the Court's ruling in mind, I will withdraw my offer.

The Court: I do not think it adds anything to the evidence.

Mr. Anderson: As to whether he received the original [39] note, I have conferred——

The Court: The offer has been withdrawn. I do not think it would add anything to the matters here.

Mr. Maxwell: I have finished examination of the witness.

Mr. Anderson: I think that is all.

(Witness excused.)

JOE ROSA

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, sir?

A. Joe Rosa.

Q. You have been sworn already, have you not?

A. Yes, sir.

Q. Are you any relation to Miss Jennie Rosa who just testified? A. No.

Q. What is your occupation, sir?

A. I run a restaurant and a bar.

Q. Where is that?

A. Glenwood Springs, Colorado.

Q. What was your occupation during the year 1947? A. I ran a restaurant and a bar.

Q. And where was that?

A. Rangely, Colorado.

Q. What was the name of the restaurant? [40]

A. Ace High.

Q. When did you buy the Ace High Club?

A. I bought it, I think it was around June of '46.

Q. And did you thereafter sell it?

A. Yes.

Q. To whom did you sell it?

A. To Mr. Raymond Percifield.

Q. When was that sale made again, sir?

A. It was in the fall of the year of, I believe, around October, 1947.

(Testimony of Joe Rosa.)

Q. What was the amount of the sale?

A. Seventy thousand dollars.

Q. What did that include?

A. That included all the fixtures, the property and the inventory.

Q. And did you set an amount on the inventories? A. Yes.

Q. How much was that?

A. Thirty-five hundred.

Q. And the balance of the \$70,000 was for the land, building and fixtures? A. That's right.

Q. How much did the land and buildings cost you in 1946?

A. Well, altogether it cost me around forty thousand dollars, in the neighborhood of forty thousand dollars. [40-A]

Q. Does that include the fixtures as well?

A. Yes.

Q. Now, I will show you plaintiff's Exhibit 20 in evidence and ask you if that is not a copy of the note which you received from Mr. Percifield on October 1, 1947, when he purchased the Ace High Club from you? A. Yes.

Q. And the amount of that note is fifty-five thousand dollars? A. That is right.

Q. Then fifteen thousand dollars was paid down by Mr. Percifield to you? A. That's right.

Q. About what was the date of that payment?

A. The fifteen thousand?

Q. Yes.

(Testimony of Joe Rosa.)

A. Fifteen thousand, I think, was at the time we made the sale.

Q. That would be around October 1st?

A. Around about there, the first to the 10th or 12th.

Q. How was that paid to you, in cash or check?

A. I think it was cashier's check.

Q. Now, did that include the inventory payment? A. No.

Q. The inventory payment, then, is still there in the note? A. Yes, it is in the note, yes.

Q. Is that the first payment shown on that [41] note?

A. It should be three thousand five hundred.

Q. Is that the first payment shown on that note?

A. That is right.

Q. And that left a balance of \$51,500?

A. That is correct.

Q. Did you receive payments from Mr. Percifield during the years 1948 and 1949?

A. Well, whatever is on the note here. We received all the payments until—I can't recall the time—until there was a suit of Mr. Percifield against me on the same deal here.

Q. That was later on? A. Later on, yes.

Q. You gave the note to the bank to collect for you? A. That's right.

Q. Now, at the time you sold the Ace High Club, you were operating it yourself immediately prior to that time? A. That's right.

(Testimony of Joe Rosa.)

Q. And was gambling carried on in the premises, Mr. Rosa?

A. I refuse to answer that question, on the ground it might tend to incriminate myself.

Q. Now, you say the club cost you \$40,000 in June of 1946? A. Well——

Q. I mean your total cost?

A. Total cost, yes.

Q. About \$40,000? [42] A. Yes.

Q. And that included the land and buildings?

A. That is right.

Q. And fixtures? A. That's right.

Q. And those were substantially the same fixtures that you sold to Mr. Percifield in October, 1947? A. Yes, I sold everything I had.

Mr. Maxwell: That will be all.

Cross-Examination

By Mr. Anderson:

Q. Now, Mr. Rosa, you say the inventory is represented there on the first payment on the note of \$3,500? A. Yes, sir.

Q. How did you arrive at that inventory?

A. We took inventory and we figured out what it was.

Q. That is, you took inventory of what was on hand? A. Yes.

Q. And it was \$3,500—that is the way you reached it? A. Yes, that's right.

Q. Who did you buy the Ace High Club from?

(Testimony of Joe Rosa.)

A. I bought the Ace High Club from Ace—I have forgotten his last name. His first name was Ace—Alberts, I believe.

Q. And you operated it from that time until you sold it? A. That's right.

Q. Did you do any repairing on it while you had it? [43]

A. I paid \$15,000 for this little cafe that Alberts had and then I built an addition to the club alongside of it.

Q. Then the purchase price from Mr. Alberts wasn't \$40,000?

A. No, it was \$15,000. Altogether it cost me about forty thousand dollars.

Q. Could you describe the building you bought for \$15,000?

A. It wasn't much of a building.

Q. It was what you call a shack?

A. That is right.

Q. And you had that there at that time and then you built around it? A. Yes.

Q. You didn't tear it down?

A. No, I didn't tear it down.

Q. And you built the present building you sold around this shack of Mr. Alberts'?

A. That's right.

Q. And you operated it at that time until the time you sold it? A. That's right.

Q. Did you make any money out of the operation?

(Testimony of Joe Rosa.)

Mr. Maxwell: We object as incompetent, irrelevant and immaterial.

Mr. Anderson: We submit it has a direct bearing, your Honor. Answer the question.

A. No, I lost money. [44]

Q. And you were operating it during the big years of the Rangely boom? A. That's right.

Q. Rangely was a boom oil town?

A. Well, supposed to have been.

Q. And that, you say, was the big years?

A. That's right.

Q. How much money did you lose?

A. Well, I can't tell you, but I think I lost, I lost around four hundred or five hundred dollars in my total operations.

Q. How did you arrive at the \$3,500 inventory in the note? Is there anything in the note itself to indicate that is inventory?

A. The price was \$70,000, including inventories, and we took the inventory before we made the deal and when we were making the deal, and the inventory, it came to \$3,500.

Q. That was included, then, in the \$70,000?

A. That is right.

Q. And the gross sale price of everything was \$70,000? A. That is right.

Q. Whether inventory, good will, or whatever?

A. Well, the inventory, we had that all marked; we took that inventory at that time and that was \$3,500. We took that inventory before he took it.

Q. But after you did take inventory, the gross

(Testimony of Joe Rosa.)

sale price was \$70,000? [45] A. That's right.

Q. Regardless of what it included?

A. Well, we reached an agreement—in other words, we were doing this that way and I wanted \$70,000 plus inventory, and then after we took the inventory, I agreed I would throw the inventory in.

Q. Still \$70,000? A. Yes.

Mr. Anderson: That is all, your Honor.

Redirect Examination

By Mr. Maxwell:

Q. Now, I want to straighten out this \$40,000. Your cost of \$40,000 included your \$15,000 purchase price? A. That is right.

Q. So you added another \$25,000 worth of improvements to the building, is that right?

A. That is right.

Q. What type of improvements did you add there?

A. Well, improvements by way of another two rooms.

Q. What kind of construction?

A. Construction was cement blocks and stucco.

Q. Were they large rooms?

A. Well, I would say they were around 24 by 24.

Q. And then did you add modern fixtures to the place? A. Well, the best I could get.

Q. That all came to about \$25,000? [46]

A. That's right, just about.

Mr. Maxwell: I have no further questions.

(Witness excused.)

(Jury admonished and recess taken at 4:30 p.m.)

February 15, 1956—10:00 A.M.

(Defendant present with counsel and counsel for the government present. Presence of the jury stipulated.)

The Court: Let the record show that this is the third day of the trial in the matter of the United States vs. Raymond Percifield. Ladies and gentlemen of the jury, the Court wishes you good morning, and all of counsel. Following adjournment yesterday a request was made by counsel that certain exhibits be permitted to be withdrawn from the record. Do you have the exhibit numbers on those?

The Clerk: Yes, your Honor, 17 and 18.

The Court: It is the order of the Court that plaintiff's Exhibits 17 and 18 may be withdrawn from the file and true copies thereof substituted in their place and stead.

Mr. Brown: I wish to state, your Honor, that we do not wish to avail ourselves of the benefit of the order until the trial has been completed, at which time we will withdraw them. [47]

The Court: Very well. Then the order will be amended, to the effect that the withdrawal will be after the trial. Now, as I recall, the government was about to call another witness.

Mr. Maxwell: We will recall Mr. Carter.

J. LESLIE CARTER

having been previously sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Mr. Carter, you testified here yesterday, did you not? A. Yes, I did.

Q. And you are the representative of the Nevada Bank of Commerce, Elko Branch, Elko, Nevada? A. Yes, sir.

Q. Now, yesterday you testified about plaintiff's Exhibit 16 in evidence, is that correct?

A. That's right.

Q. And what is that Exhibit 16 again, to refresh our recollection on that?

A. Well, it is evidence of a loan that was made to Mr. Percifield by the Nevada Bank of Commerce.

Q. Now, what is the first date shown on that Exhibit 16? A. April 10, 1948.

Q. Now, have you made subsequent inquiry, since your testimony yesterday of your bank and secured additional records for a date prior to that time? [48] A. I have.

Q. Would you produce those records, sir?

A. Yes, sir, I have them right here.

Mr. Maxwell: I will ask that this document be marked government's next in order for identification.

The Clerk: Exhibit 22.

(Testimony of J. Leslie Carter.)

Q. Mr. Carter, I will ask you to explain what government's Exhibit 22 for identification is?

A. It is a record of liability account for Mr. Percifield in 1947. These records were junked and then they were changed to machine kept records thereafter, and it shows, beginning along in 19——

Q. Let us just simply identify the document there. In other words, that is a liability sheet?

A. Yes, prior years.

Q. And it is for the account of Mr. Percifield?

A. Yes.

Q. And it reflects the amount that Mr. Percifield received from the bank? A. Yes.

Q. And it also reflects loans and repayment of loans during the period January 1, 1948, up through April 10, 1948? A. That's right.

Mr. Maxwell: I will offer Exhibit 22 in evidence, your Honor. [49]

Mr. Puccinelli: No objection.

The Court: The offer will be received in evidence as government's Exhibit 22.

Q. Now, sir, does this document reflect in what amount Mr. Percifield was indebted to the Nevada Bank of Commerce as of December 31, 1947?

A. It does.

Q. And what was that amount?

A. Two thousand dollars.

Q. Does that document show that that amount was subsequently paid?

A. On January 5th that amount was paid and it shows a zero balance.

(Testimony of J. Leslie Carter.)

Q. Was there a subsequent loan taken out by Mr. Percifield?

A. On the same day, January 5, 1948, it shows renewal here, one thousand dollars.

Q. And is that the same amount that is shown on your other liability sheets as due on April 10, 1948? A. That's right.

Q. That is the same loan then? A. Yes.

Q. Are there interest payments shown on that sheet?

A. Yes, the interest was paid on January 5, 1948.

Q. In what amount? A. \$37.67. [50]

Q. When was that original loan of two thousand dollars made? A. September 27, 1947.

Q. Did your bank receive any security?

A. I have a loan report here that goes along with that particular loan, which shows that it was a title mortgage on a 1946 Buick sedan.

Q. When a bank makes loans on automobiles, they generally require the title to be clear or in the name of the person?

A. Well, when they make a loan, they have to have the title certificate in their possession, showing them as the legal owner.

Mr. Maxwell: I have no further questions.

(Testimony of J. Leslie Carter.)

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Carter, what is the normal business practice of your bank—assuming that a person has an account with your bank and a loan is made, what is your normal business practice in making that loan? How is it actually given to the individual?

Mr. Maxwell: Your Honor, I am going to object to this. I have no objection to any testimony as to what was the—the practice in this particular instance, but I think normal business practice, as it exists now, may be completely different from what it was in 1948. Secondly, I think it is asking the witness for his conclusion. I have no objection to any testimony what was the practice in this case.

Mr. Puccinelli: I will amend my question to have it read as such. [51]

Q. What was the business practice in this case, when the loan was made to Mr. Percifield?

A. Not being the manager at that time and just working for the Bank of Commerce, I wouldn't be able to say.

Q. Then let me show you this plaintiff's Exhibit 13 in evidence, which you will recognize as the original deposit slips of Mr. Percifield.

A. Yes.

Q. And I point to sheet No. 3 thereof and ask you if you will state the date that appears at the head of that particular deposit slip?

(Testimony of J. Leslie Carter.)

A. January 5, 1948.

Q. And I will ask you to read the first entry.

A. Note, one thousand dollars.

Q. And that is on January 5, 1948?

A. Right.

Q. One thousand dollars, and it is a note?

A. Yes.

Q. On government's Exhibit 22 on January 5, 1948, the last entry on that particular exhibit, shows how much of the amount of the loan?

A. A thousand dollars.

Q. And it is on the same date as indicated on the note on the deposit slip? A. Yes. [52]

Mr. Puccinelli: I have no further questions.

Mr. Maxwell: I have no questions.

(Witness excused.)

WILLIAM W. SMITH

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. William W. Smith.

A. Gillette, Wyoming.

Q. What is your occupation, sir?

A. Banking.

Q. What bank? A. Stockmen's Bank.

Q. Where is that located?

(Testimony of William W. Smith.)

A. In Gillette, Wyoming.

Q. You have been asked to bring certain records, relating to accounts of Raymond Percifield and/or Mossie Percifield with your bank? A. Yes.

Q. And you have those records, sir?

A. Yes, I do.

Q. Now, would you tell us what this first sheet is, sir?

A. That is Raymond Percifield's account with our bank for the year '47, up to the time it was closed.

Q. Which is what time?

A. The 8th of June, 1950.

Mr. Maxwell: I ask that the document be marked as the [53] government's next in order, for identification.

The Clerk: 23.

Q. Now, Mr. Smith, you have an additional sheet here. I wonder if you could tell us what that is?

A. That is Mrs. Percifield's account. She had a balance——

Q. I prefer you not read the sheet. Can you tell us exactly what that sheet is?

A. Transcript of her account.

Q. Transcript of her account with the bank. Is the date of this 1948 and 1949?

A. That's right.

Mr. Maxwell: I ask that that be marked for identification.

The Clerk: 24.

(Testimony of William W. Smith.)

Q. Now, referring to Exhibit 23 for identification, Mr. Smith, does that sheet show the balance at the end of the year 1947? A. Yes, sir.

Q. What account is that again?

A. Raymond Percifield.

Q. What is the balance at the end of 1947?

A. \$86.15.

Q. And what was the balance at the end of 1948?

A. The same.

Q. Is that specifically shown on that sheet?

A. No, sir; there was no activity in 1948. [54]

Q. What was the balance at the end of 1949?

A. \$86.15.

Q. Was that specifically shown on that sheet?

A. No, sir; no activity in 1949.

Q. In other words, there is a blank in there and it goes up to what date?

A. The account was closed the 8th of June, 1950.

Q. At that time the entire balance of \$86.15 was withdrawn? A. That's right.

Q. And that balance ran from December 31, 1947? A. Yes.

Q. Now, on Exhibit 24 for identification, does that sheet show the balance at the end of 1947 in the account of Mossie Percifield, I believe that is?

A. Yes.

Q. What is that amount?

A. The end of '47?

Q. The end of '47, December 31st.

A. \$63.11.

Q. Does that show the balance at the end of 1948? A. Yes.

(Testimony of William W. Smith.)

Q. How much is that? A. The same.

Q. Is that specifically shown on this sheet?

A. No, it is not. [55]

Q. That is the same situation as the other exhibit?
A. That is right.

Q. In other words, no activity?

A. No activity.

Q. How about the end of the year 1949?

A. It was the same.

Q. Was there no activity again?

A. No activity.

Q. Is that specifically shown on the sheet?

A. No.

Q. When was the account finally closed out?

A. It has never been closed. It was there the 8th day of February of this year, \$63.11.

Mr. Maxwell: I will offer Exhibits 23 and 24 in evidence.

Mr. Puccinelli: No objection, your Honor.

The Court: The offers will be received in evidence on the part of the government, bearing the same numbers by which they were identified, being plaintiff's Nos. 23 and 24.

Mr. Maxwell: I have no further questions.

Cross-Examination

By Mr. Anderson:

Q. How long, Mr. Smith, have you known Mr. Percifield and Mossie Percifield?

A. Oh, I think about twenty years. [56]

(Testimony of William W. Smith.)

Q. What business was Raymond Percifield in when you first knew him?

Mr. Maxwell: I will object to this, as beyond the scope of direct examination. This man was brought here to produce some bank records. I can't see that Mr. Smith's knowledge of Mr. Percifield, or knowledge of his business has anything to do with direct and in effect would be part of the defendant's case.

The Court: The Court feels the observation rather pertinent, counsel. If you are thinking of making a character witness of Mr. Smith for Mr. Percifield, you may make him your witness. Objection is sustained at this time.

Mr. Anderson: We would ask that this paper be marked as defendant's Exhibit C.

Mr. Maxwell: For identification.

The Court: Yes.

Q. Mr. Smith, I show you what has been marked defendant's Exhibit C for identification and ask you if you know what that is? A. Yes, I do.

Q. What is it?

A. Mossie Percifield's account with the bank for the years 1943, 1944, 1945, up to the present time.

Mr. Maxwell: Now, may it please the Court, I would object to any records of Mossie Percifield at that bank, or any [57] other bank, during the years 1943 on up to and including December 31, 1947.

Mr. Anderson: We haven't offered anything yet.

(Testimony of William W. Smith.)

Mr. Maxwell: I object to any testimony with respect thereto. It is immaterial and irrelevant.

Mr. Anderson: Your Honor, I would like to identify it.

Mr. Maxwell: It has been identified.

Mr. Anderson: Then there is nothing before the Court to submit.

The Court: Gentlemen, let us go along.

Q. I will ask you, is this part of the identical account about which you testified? A. Yes.

Q. And the other sheet of paper which has been offered in evidence? A. Prior today, yes.

Q. That is part of the same account?

A. Yes, sir.

Mr. Anderson: Now, if the Court please, we submit it is admissible. They brought it up. They can't hide the rest from us.

The Court: I see no harm in it.

Mr. Maxwell: Your Honor, may I be heard on the matter for one minute? [58]

The Court: Yes, you may.

Mr. Maxwell: As the Court, of course, recognizes, the only two years with which we are concerned are 1948 and 1949.

The Court: That is correct, counsel, and the jury will be so instructed.

Mr. Maxwell: Yes, your Honor, that I clearly understand and if we admit this transcript that they have, with respect to the years 1943 through 1947 will also be admitted and we will have a record here that may go back twenty-five or thirty years for all

(Testimony of William W. Smith.)

I know. I think that the evidence, at least insofar as the government's case is concerned, shall be confined to two years, and maybe the defendant's case. We shall certainly object strenuously to any evidence outside of two years. Certainly there has been no materiality shown as to 1943 up through 1947. I simply do not believe the record should be cluttered with all these matters.

The Court: Well, it is clear to all of us that out of several years of the defendant's transactions, the government has cut out two years and set them up for tax evasion.

Mr. Maxwell: Yes, your Honor, that is right. Those are the two years he has been indicted for.

The Court: I believe in fairness to the defendant that it is material and relevant not, to use an expression, to pick two years out of the air [59] without a leading up. Now I do not know what counsel has in mind, what proof he may see fit to offer, and I will rule on that when it comes up, but I see no reason why the offer should be rejected and defendant's Exhibit C for identification will be received in evidence and marked defendant's Exhibit C in evidence.

Q. Mr. Smith, showing you defendant's Exhibit C, I will ask you—I believe you have already stated—is that a continuation of the account as shown by government's exhibit of Mossie Percifield?

A. The other exhibit carries it on.

Q. That is what I mean.

A. This is prior to the exhibit.

(Testimony of William W. Smith.)

Q. And the account was opened in 1943?

A. Yes.

Q. Five thousand? A. Five hundred fifty.

Q. What was the most, and on what date, that account ever had?

Mr. Maxwell: I object to that as incompetent, irrelevant and immaterial. The document speaks for itself.

The Court: The witness may answer.

A. \$5,073.17 was the highest balance she had, on February 27, 1946.

Q. And was that withdrawn down to the small balance that is left in one or two checks? [60]

A. In two checks.

Q. What were the amounts of those checks?

A. One check was drawn for \$600 March 6, 1946, and one for \$4,400 April 1, 1946.

Mr. Anderson: That is all we have.

The Court: Any redirect?

Mr. Maxwell: No, your Honor.

The Court: May this witness be excused for the duration of the trial?

Mr. Anderson: No, your Honor, we will want to call him.

The Court: Very well. You will remain in attendance then.

W. D. FORTNER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, will you state your full name, Mr. Fortner?

A. William David Fortner.

Q. And you came into court yesterday and you were sworn by the clerk, were you not?

A. Yes, sir.

Q. Can you hear my questions all right?

A. Yes, sir.

Q. Where do you live? [61]

A. Browder, Montana.

Q. You have lived there how long?

A. About fifteen years, a little over fifteen.

Q. What business are you in up there?

A. Ranching.

Q. Do you know Raymond Percifield?

A. I do.

Q. What relation is he to you?

A. He is my son-in-law.

Q. Married to one of your daughters, is that correct?

A. That's right.

Q. How long have you known him, Mr. Fortner?

A. Oh, I imagine twenty-five years.

Q. Mr. Fortner, did you bring some papers along with you that we requested in our subpoena?

A. I have.

Q. I wonder if I could see those, sir?

(Testimony of W. D. Fortner.)

A. Yes, sir. That is all I have.

Q. Now, for the purpose of identifying that paper that you brought along, what is that, sir?

A. Well, that is the money I loaned him.

Q. When you say "him," who do you mean?

A. Mr. Percifield.

Q. And when you say money you loaned him, what you really mean is evidence of that? [62]

A. Yes.

Q. That isn't the actual money, is it?

A. Oh, no; this is not the actual money.

Q. Do you recall what year that was in?

A. No, I can't recall just what year. I could——

Q. You look at the note, it is all right.

A. No, I just couldn't say just how long this note was given for. It should tell us up there. Unfortunately I have no education, you know, and I am handicapped; I can't read and write, but I know it states here when this note was given.

Mr. Brown: Your Honor please, may I have the Court's and counsel's indulgence to ask leading questions?

The Court: You may, under these conditions.

Q. First of all, how much is the note for?

A. Two thousand dollars.

Q. Isn't there a date on that note?

A. Yes, sir, I guess there is.

Q. You can't tell just exactly what it is?

A. No. It should be there. My banker drewed it up.

Q. You see your signature on there?

(Testimony of W. D. Fortner.)

A. Yes.

Q. Is that your signature?

A. Right here.

Q. Now, is this the instrument that was given to you by Mr. Percifield? [63] A. It was.

Q. Do you recall the circumstances surrounding his giving you this instrument? Wasn't it after you loaned him some money?

A. No. You mean when he borrowed that money?

Q. Yes. Didn't he give you this paper when he borrowed some money?

A. Yes. He wanted to pay off something at Rangely or Wendover, that is what he said.

Q. Then he gave you this when you gave him the money? A. No, he gave me that before.

Q. But it was for the money that you loaned him? A. Yes, sir.

Q. Do you recognize his signature? Do you see it? A. No, I wouldn't.

Mr. Brown: We wish to have marked for identification promissory note dated at Gillette, Wyoming, November 17, 1947, in the amount of two thousand dollars, payable to W. D. Fortner, signed by Raymond Percifield, as government's Exhibit 25 for identification. We offer the note in evidence as plaintiff's next in order.

Mr. Puccinelli: We have no objection.

The Court: The offer will be received in evidence as plaintiff's Exhibit 25.

Q. Now, Mr. Fortner, did you loan money to

(Testimony of W. D. Fortner.)

your son-in-law on just one occasion, or did you loan him money on several occasions? [64]

A. Different occasions.

Q. Now, do you recall ever having received a note for any other amounts about this same time in 1947?

A. Well, I can't. It seems like that some time I received payment on the note for \$140, but I don't know whether it was '47, '48 or when.

Q. Now, referring to this two thousand dollar loan, did you have a banker who helped you with your——

A. Banking business.

Q. Banking business? A. That's right.

Q. Did he keep track of your loans and bank accounts, and so forth and so on?

A. Well, he was supposed to. I left all my papers with him and told him what to do.

Q. Did you keep some cattle for Raymond Perci-field in 1947, '48 and '49?

A. Well, I think it is cattle.

Q. Well, now, on the back of this note it says 7-19-48, paid \$300.

A. Yes.

Q. And then it says, 10-17-49, paid \$500.

A. Yes.

Q. Now, does that bring to mind anything about the cattle?

A. Well, now, that's the year the cattle was closed out and he had the cattle—that is '48? [65]

Q. Three hundred dollars in '48, yes, sir.

A. That is the year the cattle—I believe \$500 in '48.

(Testimony of W. D. Fortner.)

Q. \$560. A. That is '48, too.

Q. No, that is '49. A. Yes.

Q. Now, first of all, I think maybe if we start this way—would you tell the jury and the Court about these cattle that you kept for Raymond Percifield, how many did you have?

A. Well, he bought three cows and two calves.

Q. Was that before you loaned him the money?

A. Well, I believe it was.

Q. And did you keep them on your ranch?

A. Yes, sir.

Q. And did they have some calves?

A. Well, they had two calves the next year.

Q. Did you sell those calves?

A. I sold the first two calves and one dry cow.

Q. You kept the proceeds, the money you got from the sale of those cows, didn't you?

A. Well, I was thinking the most proceeds went to him, I was thinking.

Q. But you are not sure?

A. I am not sure. I know I kept some of it.

Q. You kept some of it to apply on this note, didn't you? [66] A. That's right.

Q. Do you know what Mr. Percifield paid for these cows?

A. Well, I can't just recall just how much, but it wasn't much because it wasn't too good a stock.

Q. Do you know who he bought them from?

A. He bought them from Mr. Chatters sale. I got some at the same time.

Q. That is an auction yard?

(Testimony of W. D. Fortner.)

A. No; we call it a dry farmer's closing out, just an auction sale.

Q. Can you recall approximately how much he paid for them?

A. No, I can't, just offhand. I bought so many cattle off and on I just couldn't say.

Q. Do you remember what cows sold for in '47 and '48? A. No, I can't. A fairly good price.

Q. A good price in those years, wasn't it?

A. But I just can't say the price they brought.

Mr. Brown: That's all right. I think you may inquire.

Cross-Examination

By Mr. Anderson:

Q. Mr. Fortner, I believe Mr. Brown read to you certain payments on the back of the note, one on July 19, 1948, for \$300; then October 17, 1949, paid \$560. Did you understand that when he read that to you? A. Well, I thought I did. [67]

Q. Well, was that payment on the principal or interest? A. No, that was principal.

Q. You thought it was? A. Yes.

Q. Who wrote the payments on there, do you know? A. Mr. Steele.

Q. The banker?

A. He is the banker but he has passed away here about a year ago. Mr. Smith, I guess, he could identify that handwriting.

Q. Have any other payments been made on this note at any time? A. No.

(Testimony of W. D. Fortner.)

Q. You still own the note?

A. I have another one.

Q. Where is the other one?

A. I left it at home.

The Court: May the Court ask a question? You, Mr. Anderson, have probably surrounded what I want to know.

Q. (By the Court): Mr. Fortner, was any payment made on that note, either in actual money or was the only payment that kept from the cattle sales? A. Cattle sales.

Q. (By Mr. Anderson): One other question, Mr. Fortner, please. Did you loan Mr. Percifield any money in 1950?

Mr. Brown: We will object to that, your Honor, on the ground it is irrelevant and immaterial. [68]

The Court: Objection sustained.

Mr. Anderson: We would like to make this observation, your Honor.

The Court: You may.

Mr. Anderson: It is our position, and I think the Court has already gathered, that if there was a loss in 1950, it can be credited back.

The Court: You mean a loss to Mr. Percifield?

Mr. Anderson: Yes. And under the authorities that is a perfectly sound proposition of law.

The Court: I still can't understand how the borrowing of money by Mr. Percifield from this witness would indicate any loss.

Mr. Anderson: The borrowing of money in 1950 would make it have a tendency to establish whether

(Testimony of W. D. Fortner.)

or not he had a loss in 1950. We have some authorities on that proposition.

The Court: I understand the inferences that are possible, but it seems to me they are pretty remote. But the Court has permitted some of the evidence to go beyond the years and I believe that perhaps we will follow that rule throughout the case.

Mr. Maxwell: May I suggest, your Honor, that we have a memorandum of law in the process of being typed and we can submit that at noon and perhaps ruling on this matter could be [69] delayed until that time because Mr. Fortner will probably be here.

The Court: Very well. Let the record show then that the ruling made on the objection to counsel's question on cross-examination, as to whether or not any money was loaned by this witness to the defendant in 1950 will be held in abeyance, subject to the submission of memorandum on the part of government's counsel.

Mr. Anderson: We have no further questions.

Mr. Brown: We have no further questions.

(Jury admonished and recess taken at 11:00 a.m. for 15 minutes.)

11:15 A.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.)

EDWARD A. STROUD

a witness on behalf of the government being duly sworn, testified as follows.

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, state your full name. A. Edward A. Stroud.

Q. Where is your home, sir?

A. Salt Lake City.

Q. And you have resided there for many years?

A. Well, since 1949.

Q. And where is your place of business? [70]

A. 76 West 2nd South, Salt Lake City.

Q. And you have been in business in Salt Lake City since that time? A. Since 1947.

Q. What is the nature of that business?

A. Club, bar equipment.

Q. What is the name of the business?

A. Salt Lake City Card Company.

Q. Did you know Raymond Percifield in 1948 and 1949? A. Yes, sir.

Q. Do you know where he resided?

A. I do not.

Q. Do you know what his business was?

A. No; only I assumed he had a club.

Q. Then you don't actually know?

A. No, I do not.

Q. Did you have any business transactions with Mr. Percifield in 1949? A. Yes.

Q. Did you bring with you certain records that

(Testimony of Edward A. Stroud.)

were requested by the government? A. Yes.

Q. I wonder if I may see you?

A. These two invoices and a shipping tag.

Q. Now, referring to invoice dated September 6, 1949, order No. [71] 79, would you state just generally, for the purpose of identification, what that is?

A. Well, it is 21 layout, plus the freight.

Mr. Anderson: We object at this time——

The Court: The answer may be stricken.

Q. Just generally what is that? Is that an invoice reflecting the sale of certain equipment by you? A. Yes, sir.

Q. What is the number of the invoice?

A. 79.

Q. And what is the date?

A. It is 8-23-49.

Q. And does it reflect a sale to an individual?

A. Well, Raymond Percifield.

Q. What is the little card that is stapled to the invoice?

A. That is what the government gives us at the postoffice. It is on the COD tag.

Q. Is it part of that record?

A. That is what it is on. That is the part they give us to keep when they put the tag on.

Mr. Brown: We would like to have this marked for identification as plaintiff's exhibit next in order.

The Clerk: 26.

Q. Now, with reference to the second exhibit,

(Testimony of Edward A. Stroud.)

what is the order number? [72] A. No. 80.

Q. And it is dated what? A. 8-23-49.

Q. Does it reflect a sale to an individual?

A. Raymond Percifield.

Q. There are certain other documents stapled and attached thereto, what are they?

A. Well, one of them is part of a check stub of the Rangely Truck Line and the other is bill of lading.

Mr. Brown: I ask that this be marked for identification as plaintiff's next in order.

The Clerk: 27.

Q. Now, did I ask you, sir, if you had any business transactions with Mr. Percifield in 1949?

A. Yes, sir.

Q. And your answer was what? A. Yes.

Q. And did I ask you if you sold him certain gambling equipment?

Mr. Anderson: We will object to that, if the Court please, at this time as incompetent, irrelevant and immaterial and tends to prove a separate offense, not related to anything that is involved here.

Mr. Brown: What offense?

The Court: On the face of it, the Court does not see [73] any offense. It refers to the transaction of certain equipment.

Mr. Anderson: He said gambling.

The Court: I know, but I do not know anything about the gambling equipment.

Mr. Anderson: Well, of course, I assumed.

(Testimony of Edward A. Stroud.)

Maybe I am anticipating. This shows shipment to Rangely. I submit it is immaterial at this time, in addition to any other objections.

The Court: Well, it appears to the Court that the exhibits speak for themselves, and they already show what it is, so I see no harm in asking the question.

Mr. Anderson: The exhibits, however, are not in evidence. They have been marked for identification.

The Court: That is right. I thought they were.

Mr. Brown: I intend to lay the foundation for their admission.

Q. Now, do the records reflect sales to Mr. Perci-field? A. Yes.

Q. Were these records made by you or under your direction?

A. It was made by my wife. She does all the book work.

Mr. Brown: Now, we offer the exhibits 26 and 27 into evidence as plaintiff's 26 and 27.

Mr. Anderson: May we ask a question for the purpose of objection? [74]

The Court: Yes, you may, counsel.

Q. (By Mr. Anderson): Mr. Stroud, you say these records were made by your wife?

A. Yes.

Q. Do you have any independent recollection of their making? Did you see them at the time they were made?

A. Well, no, I did not see them. I was in the

(Testimony of Edward A. Stroud.)

back end of the shop probably when they were made in the front.

Q. And that is what you know about it?

A. That's it.

Mr. Anderson: If the Court please, we object to the offer on the ground it is incompetent, irrelevant and immaterial and not sufficient foundation laid.

Mr. Brown: If the Court please, the federal evidence rule, of course, is different from the law rule. We have to establish two facts, that they were done in the ordinary course of business and done either by the party who testified or under his direction or control. That is sufficient to lay the foundation under the federal rule.

The Court: The objection of counsel goes to the fact there was not sufficient foundation laid for the introduction of these two exhibits, marked 26 and 27 for identification. This apparently was a one man and wife business. The Court is of the opinion that the proper foundation was laid and the objection is overruled. The offers made on [75] the part of the government will be admitted in evidence as government's Exhibits 26 and 27.

Q. Now, with reference to Order No. 79, would you explain what the nature of the sale was?

Mr. Anderson: I think we will have to object to that, if the Court please. It is incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in the case.

Mr. Brown: Well, I could have the clerk read

(Testimony of Edward A. Stroud.)

the records which are in evidence. I am simply doing this in the interest of saving time.

The Court: What do you mean by the clerk reading the exhibits in evidence?

Mr. Brown: Take the exhibits before the jury, your Honor.

The Court: You may answer. Objection overruled.

Q. Would you state the nature of the equipment?

A. Well, No. 1 is XO43 black jack, which is plus freight.

Q. What is that?

A. It is a piece of green felt, a little lettering, space as to players who place their bets.

Q. What was the cost?

A. The cost was \$27.50.

Q. What was the second item, sir?

A. The second item was No. H265 layout for crap table.

Q. That is the same thing, isn't it? [76]

A. It is a piece of green felt cloth with designs stencilled on it.

Q. What was the cost? A. \$125.00.

Q. Now, the total was?

A. \$152.50 plus shipping charges.

Q. Now, would you explain the nature of the little ticket that is connected to the invoice?

A. Well, that is if the postoffice uses a COD ticket.

Q. Collect on delivery?

(Testimony of Edward A. Stroud.)

A. Collect on delivery.

Q. Now, with reference to the invoice No. 80, which is the second invoice—excuse me, I forgot to ask you the date of that sale, but I believe I did ask you the date. What was the date of the sale on the first one?

A. Well, you see the date probably of the sale was September 6. The order was 8-23-49 and it was shipped a few days later.

Q. Do you recall what the shipping charges were? What is that first entry there?

A. Well, it is inked, but I imagine it was billed out as \$153.55 less \$152.55.

Q. Now, with reference to the second invoice, would you explain to the Court and the jury what was the sale for? What was the date of that invoice?

A. September 6, 1949. [77]

Q. And what was the first item?

A. One hundred fifty green square edge chips.

Q. What was the denomination of those chips?

A. Denomination of 50 cents.

Q. What was the cost? A. \$28.25.

Q. And the second item, sir?

A. Two thousand white square edge chips.

Q. And the denomination?

A. One dollar.

Q. And the cost? A. \$270.00.

Q. And the third item?

A. Three hundred yellow square edge chips.

Q. The denomination? A. Five dollars.

Q. And the cost? A. \$40.50.

(Testimony of Edward A. Stroud.)

Q. And the last item?

A. Two hundred dark blue square edge chips.

Q. The denomination?

A. Twenty-five dollars.

Q. And the cost? A. \$27.00.

Q. And the total? [78] A. \$357.78.

Q. Now, there is attached to that invoice a bill of lading? A. Yes, sir.

Q. What does that reflect?

A. Well, it reflects the COD of \$357.78.

Q. Consignor?

A. Salt Lake City Card Company.

Q. And it was consigned to Mr. Raymond Perci-field, was it not?

A. It was sent to him, yes, sir.

Q. Where? A. At Rangely, Colorado.

Q. What place? A. Care of Ace High.

Q. There is a check stub attached to that record. Would you explain what that is, please?

A. Well, it is just a stub that we send out with the check.

Q. From the shipper?

A. From the truck lines.

Q. And you receive payment from the truck line? A. Yes, sir.

Q. Of shipments being made COD?

A. Yes, sir.

Mr. Brown: I think that is all.

(Testimony of Edward A. Stroud.)

Cross-Examination

By Mr. Puccinelli:

Q. So I may have my records clear, how do you spell your name? [79] A. S-t-r-o-u-d.

Q. Mr. Stroud, do you have any knowledge as to where this equipment was used, after you sold it?

A. No, sir.

Mr. Puccinelli: I have no further questions.

(Witness excused.)

BLAKE CRAFT

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. State your name, please.

A. Blake Craft.

Q. What is your occupation?

A. Motel operator.

Q. Where do you reside?

A. Rapid City, South Dakota.

Q. You run a motel at Rapid City?

A. Yes, sir.

Q. Do you know the defendant, Raymond Percifield? A. Yes, sir.

Q. Are you any relation to Mr. Percifield?

A. Personally I am not; my wife is.

(Testimony of Blake Craft.)

Q. And what relation?

A. My wife is his wife's sister.

Q. Did you ever work for Mr. Percifield?

A. Yes, sir. [79-A]

Q. When did you work for him?

A. I worked for him the later part of '48, '47, '48 and '49 and into '50.

Q. Where did you work for him, sir?

A. Wendover, Nevada; Rangely, Colorado.

Q. When did you work for him at Wendover, Nevada?

A. The latter part of 1946, '47, '48 and part of '49.

Q. What work did you do, sir?

A. I was bartender.

Q. At the Nevada Club at Wendover?

A. Yes, sir.

Q. Did you have any financial transactions with Mr. Percifield during the years 1948 and 1949?

A. Nothing, except I had him buy me a car.

Q. When was that, sir?

A. That was in July of '48.

Q. Did you pay him the money to buy you this car?

A. No, sir.

Q. Did he pay for the car?

A. Yes, sir; he paid for the car.

Q. Do you know how much he paid for the car?

A. Yes, sir; I do.

Q. Do you have any documents with you to show that?

A. Yes, sir.

Q. Now, you have handed me a sheet of paper

(Testimony of Blake Craft.)

and I wonder if you [80] will explain what that paper is? A. This piece of paper?

Q. Yes, sir. Is this an invoice for that car?

A. Yes, sir; this is an invoice.

Q. And the information on this invoice relates to the car that Mr. Percifield bought for you?

A. Yes, sir.

Mr. Maxwell: I ask that the invoice be marked as government's next in order.

Clerk: 28.

Q. Now, does the invoice reflect the total price of the automobile? A. Yes, sir; it does.

Q. What was that? A. \$2,733.60.

Q. Is the invoice dated? A. Yes, sir.

Q. What is the date? A. July 1, 1948.

Q. And the make of the automobile?

A. It is a Hudson.

Q. What year? A. 1948.

Q. How did it come that you bought this car, sir?

A. Mr. Percifield was down in Colorado and he knew we wanted a [81] new car and he happened to run across these just come in and he asked about them, so he called me up by telephone and told us what they had and he picked out one out of two cars.

Q. And you were in Wendover at that time?

A. Yes.

Q. Then did he buy the car?

A. After I called the bank at Elko to transfer \$2,800 to his account.

Q. From your account?

(Testimony of Blake Craft.)

A. Yes, sir; from my account.

Q. And showing you deposit slip, which is part of plaintiff's Exhibit 13, in evidence, dated 7-6-48, will you read what it says on there?

A. Blake Craft, \$2,800.

Q. Is that about the time you made the transfer from your account to his account?

A. Yes, sir.

Q. Did you or your wife have any financial transactions with Mr. Percifield in 1947?

A. I do not believe so. My wife had some kind of transaction with his wife. I don't know what the date was. I believe it was in 1948.

Q. To refresh your recollection, would you say a loan of \$3,500 was made? A. Yes, sir. [82]

Q. Was that loan made to Mrs. Percifield?

A. To Mrs. Percifield.

Q. Do you know whether or not it was for the use of Mr. Percifield?

A. Yes; I think it was on account of a business obligation.

Mr. Maxwell: I will offer in evidence Exhibit No. 28 for identification.

Mr. Anderson: There is no objection.

The Court: The offer is received in evidence as government's Exhibit No. 28.

Q. Mr. Craft, you say you transferred \$2800 to Mr. Percifield? A. Yes, sir.

Q. And the price of the car was \$2,733.60?

A. Yes, sir.

Q. Did you ever get the \$66.40 back?

(Testimony of Blake Craft.)

A. No, sir; I think that was for expenses.

Q. And perhaps the telephone call he made to you? A. Could have been; yes, sir.

Mr. Maxwell: That will be all.

Cross-Examination

By Mr. Anderson:

Q. You say the loan that your wife made was to pay for some business obligation?

A. I think so, sir.

Q. Mr. Percifield's business obligation? [83]

A. I believe so.

Q. And this car deal that you had with Mr. Percifield, you put the money in the bank and he drew a check on the account? A. Yes, sir.

Q. That is all there was to it? A. Yes, sir.

Q. You had some other financial transaction while you were working for him; he owed you, up to 1950, some money for the balance of wages?

Mr. Maxwell: We object to that as a leading and suggestive question.

Mr. Maxwell: This man happens to be the brother-in-law of the defendant.

Mr. Anderson: We didn't bring him here; you did.

The Court: Well, the question is certainly leading under the circumstances. I don't recall this witness being asked on direct anything about further transactions. Read the question.

(Question read.)

(Testimony of Blake Craft.)

The Court: You may answer.

A. Yes, sir; he owed me six or seven hundred or seven fifty; I don't remember exactly.

Q. That is while you were working for him?

A. Yes, sir.

Q. What year was it that that balance of wages is still owing [84] for work you did? What year did you do the work in?

A. It was the latter part of '49 and the first part of 1950.

Mr. Anderson: That is all.

Redirect Examination

By Mr. Maxwell:

Q. Now, you didn't loan Mr. Percifield any monies in connection with this? A. No, sir.

Q. This amount of money that you say was due you for wages for 1949 and 1950——

A. No, sir.

Q. ——wasn't advanced to Mr. Percifield?

A. No, sir.

Q. You just simply didn't draw on your wages?

A. That's right.

Mr. Maxwell: That's all.

Recross-Examination

By Mr. Anderson:

Q. Mr. Craft, do you know if these wages were reported on social security? A. Yes, sir.

(Testimony of Blake Craft.)

Q. They were?

A. Six hundred dollars; that I know.

Mr. Anderson: That's all.

Redirect Examination

By Mr. Maxwell:

Q. Did you report these wages for social security?

A. I wrote down and got from my withholding statement and I turned it in with my [85] withholding.

Q. Did you pay taxes on those wages?

A. Taxes was paid, yes.

Q. For what year? A. 1949, I believe.

Q. How about 1950? A. I don't know.

Mr. Maxwell: That's all.

(Witness excused.)

(Jury admonished and noon recess taken at 11:50.)

February 15, 1956—1:30 P.M.

(Defendant present with counsel and government counsel present. Jury absent.)

The Court: Gentlemen, there has been some confusion on the part of the Court as to how far it should go in permitting the admission of certain testimony beyond the two years in question. I realize that there are rather strong arguments both

ways. I thought I would just take this moment or two to give you the benefit of my confusion, if I use the word rightly. You may give me some help and it might expedite the matter of continued trial. I realize, of course, that the government is only concerned with testimony of two years, '48 and '49, but by virtue of that I can't convince myself that the defendant is similarly confined. [86] Now, I have been presented a memorandum by government counsel, I have not had an opportunity to read and I assume it is on point.

Mr. Maxwell: In part; yes, your Honor.

The Court: Do counsel have the benefit of a copy of it?

Mr. Anderson: Yes.

The Court: If counsel desire to submit anything to the Court on the point, they may; but it appears to me that there are some practical considerations to be taken in this type of action and from a practical standpoint I can see where, if a series of years are taken out of a man's or woman's business experience or their life and there is an absolute cut-off on each end, there may be a terrific showing of taxable income. It may be true over the period sales have been made of a lifetime's accumulations. Now, it is true the defendant has a right to make his case; and yet, as some of these recent decisions have intimated, figures have a way of taking unto themselves the weight of evidence; and so, if I am confined, or say rather not permitted, to come in and show my 1949 bank account and 1950, where I might start with nothing and end [87] with nothing, I am left

with a terrific unusual condition for the years the government chooses, which naturally gives rise to certain inferences that may not be refuted; and I feel, as far as the defendant is concerned, he is entitled to show the cutting-off of this period on both ends, in fairness to him. By that I do not mean to indicate to you—counsel for the government, I think, understand—that they are to show anything more than the two years; but I do not think they have a right, say, to prepare a scopic slide and put it under a microscope. That is why I have permitted these questions which elicit further information on the part of defendant's counsel on the fringe edge. Now, I believe, as a matter of academic procedure, that I could have required—perhaps should—that the defendant make the witness his own for that purpose, because really it is a part of his case, but waiving academic considerations aside, I think we will proceed faster in this way. Now, if counsel for the government feel that the Court is, in effect, permitting the defendant, under the guise of cross-examination, to make the witness his own, the government [88] may ask the right to cross-examine him on that basis and this Court will permit it. I think it makes faster time this way than if I stopped and kept the witness here two or three days. I just say this, gentlemen, in explanation how I am approaching it. As I said, I am frankly just a bit confused; but I do know this, that all of the recent cases have indicated that a defendant often finds himself in a position it is difficult to explain; and in fairness to this defendant, until the Court sees some

authority to the contrary, I am going to permit the defendant to make that showing, having in mind the expression, "But for the grace of God, there go I."

1:50 P.M.

(Jury returned into court. Presence of the jury stipulated.)

ROBERT J. MAY

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. State your full name. A. Robert J. May.

Q. What is your occupation?

A. I am a dentist.

Q. Where do you reside? [89]

A. Rangely, Colorado.

Q. Did you reside in Rangely, Colorado, in 1948?

A. Yes, sir.

Q. Do you know the defendant in this action, Raymond Percifield? A. Yes, sir.

Q. Are you familiar with his place of business at the Ace High Club in Rangely, Colorado?

A. Yes, sir.

Q. Did you go to the Ace High Club at any time during the year, 1948? A. Yes, sir.

Q. What did you observe on the premises?

A. The usual casino entertainment.

Q. Did you see any gaming? A. Yes, sir.

(Testimony of Robert J. May.)

Q. What kind of gaming did you see?

Mr. Anderson: I think we will object to that, as incompetent, irrelevant and immaterial.

Mr. Maxwell: Well, may it please the Court, we do not feel that this is irrelevant or immaterial at all. It is part of the government's proof to show the defendant was in a business. We expect to show by this witness that, besides being in the bar business and restaurant business, he was in the gambling business and we expect to show that by several other witnesses, I might add. [90]

The Court: Objection overruled.

Q. What type of gaming or gambling did you see on the premises?

A. Poker, blackjack, slot machines.

Q. Was there a dice or crap game there?

A. Yes.

Q. And how often did you go into the club and observe these activities during the year 1948?

A. Oh, once or twice a month possibly.

Q. Who was running the gambling games there?

A. Mr. Percifield.

Q. Did he handle the money in the games?

A. Sometimes.

Q. Would he run the games? A. At times.

The Court: I might add, would he act as dealer?

A. Yes.

Q. Mr. May, you say you were a dentist there in Rangely? A. Yes.

Q. Did you continue to be simply a dentist from the year 1948—did you hold public office, also?

(Testimony of Robert J. May.)

A. Yes, I was Justice of the Peace.

Q. When did you take office as Justice of the Peace? A. In November, 1948.

Q. Were you Justice of the Peace in 1949 as well? A. Yes, sir.

Mr. Maxwell: That's all. [91]

Cross-Examination

By Mr. Anderson:

Q. Dr. May, when, in 1948, did you go in Mr. Percifield's place of business the first time?

A. Well, I was always in and out of there, once or twice a month.

Q. When did you go in the first time?

A. In 1948?

Q. Yes.

A. As I recall, possibly in January.

Q. You went in once or twice in January?

A. Yes, sir.

Q. When did you next go in?

A. Oh, I don't know.

Q. You don't know when you went in?

A. It was a common practice to drop in once or twice a month.

Q. Well, did you hang around there?

A. Evenings sometimes; yes, sir.

Q. That was sort of a place where you spent your evenings?

A. No, sir; just now and then.

(Testimony of Robert J. May.)

Q. Well, what was the occasion of your going in?

A. Oh, usually for a drink or for entertainment.

Q. Was that true in 1949? A. No, sir.

Q. Didn't you go in, in 1949?

A. No, sir. [92]

Q. You weren't in there at all in 1949?

A. In the bar; yes.

Q. This gaming you saw, was that in the same room with the bar? A. No, sir.

Q. Were the slot machines you saw in the same room with the bar? A. Sometimes.

Q. Were they in there in 1949, when you went in there? A. Yes, sir.

Q. Did you take any action at that time, when you were Justice of the Peace?

A. I couldn't take any.

Q. You couldn't take any? A. No, sir.

Mr. Anderson: That's all.

Mr. Maxwell: That's all.

(Witness excused.)

Mr. Brown: Your Honor please, this morning we excused Mr. Smith and the defendant requested that he remain. May the record show that he has been released by the plaintiff?

The Court: Very well, the record will so show.

JAMES L. LOCKETT

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, would you state your full name? [93]

A. James L. Lockett.

Q. You have been previously sworn in this case?

A. That is right.

Q. Where do you reside, Mr. Lockett?

A. Rangely, Colorado.

Q. You have resided there how long?

A. Since 1947.

Q. You are acquainted with Raymond Percifield, are you not?

A. Yes, sir.

Q. Do you see him present, here in the courtroom?

A. I do.

Q. What is your occupation?

A. Tire contractor.

Q. You say you resided in Rangely in 1948 and 1949?

A. Yes, sir.

Q. Were you familiar with the Ace High Club?

A. Yes, sir.

Q. Would you kindly explain, or rather describe, the Ace High Club to the Court and jury?

A. The Ace High Club is a cafe and bar, like you have what I have seen in Nevada.

Q. Just a cafe and bar?

A. Yes, sir.

Q. Was there any gambling operated there?

(Testimony of James L. Lockett.)

Mr. Anderson: May it be understood our objection goes [94] to this whole line of examination?

The Court: Yes, it will be so understood. The record will so show. Answer the question.

Q. Was there gambling activity there?

A. Well, I have seen it; yes.

Q. In what years?

A. I believe in '48 and '49.

Q. How often did you go to the **Ace High Club**?

A. I used to eat there.

Q. How often?

A. I was in there probably daily.

Q. During 1948 and '49? A. That's right.

Q. Did you observe gambling there at all times during that time?

A. I don't know about the gambling for sure at all times. I did eat there.

Q. When you say gambling, what do you mean?

A. I don't know how to answer that question.

Q. Describe the games of chance you saw in the **Ace High Club** in 1948 and 1949.

A. I have played twenty-one and also shot dice.

Q. Did you ever see poker?

A. No; I didn't pay any attention. I don't care for poker.

Q. Did you see any slot machines?

A. Yes; I have seen slot machines. [95]

Q. You have seen slot machines?

A. Yes, sir.

Q. During 1948 and '49? A. Yes, sir.

(Testimony of James L. Lockett.)

Q. Did you have occasion to observe Mr. Percifield in the club in 1948 and 1949? A. Yes, sir.

Q. In what capacity? A. Operator.

Q. Who was running the games?

A. Different people.

Q. For instance?

A. Well, Mr. Percifield was one of them. I don't recall the names personally; I don't remember the names.

Q. There were other people operating the games? A. Yes, sir.

Q. You lived there how long?

A. Since 1946.

Q. And you went there daily, and you don't know the names of the other people who operated the games there; is that correct?

A. Yes, sir; that is correct.

Q. You observed Mr. Percifield banking the games there?

A. I don't know what you mean by banking.

Q. Did you ever see him handle large sums of money? A. I have seen him dealing. [96]

Q. Did you see him handling any large sums of money out of his pocket or out of a box or out of a safe?

A. No, sir; not out of a safe. I have seen him pay off on a table.

Q. You are sure you can't remember the names of anybody else who operated a game in the Ace High Club, during the period?

Mr. Anderson: We object to that, if the Court please, as being leading.

The Court: Objection sustained.

Mr. Maxwell: You may examine.

Mr. Puccinelli: No questions.

(Witness excused.)

WILLIAM B. BEEMER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Beemer, would you state your full name, please? A. William B. Beemer.

Q. Where do you live?

A. Rangely, Colorado.

Q. How long have you lived in Rangely?

A. Approximately ten years.

Q. You are acquainted with Raymond Percifield? A. Yes.

Q. Do you see him here in the courtroom?

A. Yes. [97]

Q. How long have you known him?

A. About eight or nine years.

Q. You resided in Rangely then, in 1948 and 1949; is that right? A. Yes.

Q. Did you know Raymond Percifield there, at that time? A. Yes.

Q. Are you familiar with the place known as the Ace High Club in Rangely? A. Yes.

(Testimony of William B. Beemer.)

Q. Will you describe it, please?

A. Oh, it is a nice club for a small town. It is—do you want the dimensions of the room?

Q. Well, just generally describe the premises, to the best of your ability.

A. It has a bar, dancing establishment, meals.

Q. Do they conduct gambling there? Was gambling conducted there, in 1948 and '49?

A. Some; yes.

Q. Did you observe it yourself? A. Yes.

Q. What type of games did you observe?

A. Well, at that time I would say black jack and poker.

Q. Did you observe any craps?

A. I can't say for sure.

Q. Did you see any slot machines, to the best of your recollection? [98]

A. I believe I would say no to that.

Q. Did you have occasion to observe Mr. Perei-field there dealing or banking those games during those years? A. Yes.

Mr. Brown: I think that is all.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Beemer, if I understood your testimony correctly, I heard you to say, in response to a question propounded by Mr. Brown, that you saw some gambling there in the Ace High Club. I think that was your answer, substantially to that effect?

(Testimony of William B. Beemer.)

A. Yes.

Q. Could you tell me whether or not gambling was conducted there continuously, during 1948?

A. 'I don't think so.

Q. In other words, there would be periods of time when there was no gambling there, is that right?

A. To the best of my recollection; yes.

Q. Was that also true during 1949?

A. Yes.

Mr. Puccinelli: That is all.

Redirect Examination

By Mr. Brown:

Q. How often did you go to the club?

A. Oh, every few days.

Mr. Brown: That is all.

(Witness excused.) [99]

DONALD C. RIDER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. State your name, please?

A. Donald C. Rider.

Q. Where do you reside?

A. Rangely, Colorado.

Q. What is your occupation?

(Testimony of Donald C. Rider.)

A. I am town administrator.

Q. How long have you lived in Rangely?

A. Since April of 1955.

Q. As town administrator, do you have custody and control of the records of the town of Rangely?

A. I do.

Q. You were asked to bring certain of those records here by the subpoena; did you bring those records with you? A. I did.

Q. May I see those records? Now, did you also, at my request, abstract certain entries from the records of the town of Rangely? A. I did.

Q. What did you abstract, as the general nature of things?

A. The amounts contributed by Raymond Perci-field, for the Ace High Club, to the town of Rangely, in 1948 and 1949.

Q. Do your records reflect such contributions?

A. They do. [100]

Q. Do your records reflect whether those contributions were compulsory or to purchase business licenses or simply donations?

Mr. Anderson: We object to that for two reasons; first, it is leading and suggestive; and second, the records will be the best evidence. The witness has testified he wasn't there at the time.

Mr. Maxwell: If the Court please, I have been attempting to lay the foundation for the admission of the abstract that the witness has prepared. The witness has requested that this town of Rangely be

(Testimony of Donald C. Rider.)

permitted to retain their records. I think this is a reasonable request. If I can get the witness to testify as to the amounts on the records that he has made an abstract of, I would like to place that abstract in the record.

The Court: You may proceed. Any objection, counsel?

Mr. Anderson: Yes. That isn't what he asked. He asked whether he was forced or compelled to contribute or voluntarily made. I do not think that had a bearing on the abstract.

Mr. Maxwell: I withdraw the question.

The Court: The question is withdrawn. There will be no ruling.

Q. How are these amounts reflected in the record as donations? A. The amounts——

Mr. Anderson: I object to the witness reading from the record until it is put in evidence.

The Court: I think, counsel, you should continue with the foundation, or if you think you have [101] established sufficient foundation, make your offer.

Q. Were these records which you have brought from the town of Rangely, were they kept in the ordinary course of municipal affairs?

A. They were. They were cash receipts of the town of Rangely.

Q. And they have been turned over to you in your line of succession as town administrator?

A. That is correct.

Q. As regular records of the town of Rangely?

(Testimony of Donald C. Rider.)

A. That is correct.

Q. And you have prepared an abstract of certain entries from those records? A. I have.

Q. And you have handed them to me?

A. Yes.

Mr. Maxwell: I will ask that they be marked for identification.

The Clerk: 29 for identification.

Q. What is the general nature of the entries which you have abstracted, Exhibit 29 for identification?

A. The one side of the entry shows the amounts that were paid or contributed to the town of Rangely. The other side the purpose or account to which they were credited. Accounts to which they were credited are donation fees, license fees, dog licenses.

Q. That abstract, however, is taken from the books of the town [102] of Rangely?

A. That is correct.

Q. Have you put down all the entries related to these items during the years 1948 and 1949?

A. I have.

Q. That show in the books of the town?

A. That is correct.

Mr. Maxwell: At this time I will offer plaintiff's Exhibit 29 for identification in evidence.

Mr. Anderson: No objection.

The Court: The offer is received in evidence as government's Exhibit No. 29.

(Testimony of Donald C. Rider.)

Q. What were the amounts under donations? Where did they finally go in the funds of the town?

A. It was paid into the general fund of the town of Rangely, which is for almost all purposes of the town, fire protection, police protection, health sanitation.

Q. Salary of officers? A. That is right.

Q. Is there anything that that general fund does not cover?

A. There are two that the general fund does not cover; one is the water fund, which is a separate fund, and the other is the service fund.

Mr. Maxwell: You may inquire. [103]

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Rider, does this Exhibit 29 reflect all of the transactions relative to Mr. Percifield for the years 1948 and 1949?

A. It reflects all transactions I have been able to find records for.

Q. I believe you testified that this last item under donations that includes, also, fire and water protection? A. It did not include water.

Mr. Puccinelli: That is all.

(Testimony of Donald C. Rider.)

Redirect Examination

By Mr. Maxwell:

Q. The donations were not compulsory, they were not the same as taxes?

Mr. Anderson: Objected to because this witness was not there and he does not know whether it was compulsory or not. I don't see how he could know.

Q. On your books, is this donation account in the same category as taxes? A. No.

Q. The donations then here are not taxes paid?

A. No.

Mr. Anderson: I move that the answer be stricken and the question, because the books would be the best evidence. He is asking what is on the books, not here.

The Court: I do not think there is any question in the minds of all of us there is a difference [104] between donations and taxes. To that extent the exhibit does speak for itself.

Mr. Maxwell: I withdraw the question. No further questions.

(Witness excused.)

WILLIAM LEHMAN

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Please state your name, sir.

A. William Lehman.

(Testimony of William Lehman.)

Q. Where do you reside, Mr. Lehman?

A. Kansas City.

Q. In 1949 where did you reside?

A. September of 1949 I lived in Rangely, Colorado.

Q. During the period September, 1949, to December 31, 1949, did you visit the Ace High Club at Rangely, Colorado? A. Yes.

Q. Would you describe the premises for us, please?

A. Well, it was a bar and cafe and dance floor. The building was located on the main street.

Q. Pretty much in the middle of town; was it not?

A. Yes; about two blocks from the middle of town.

Q. Did you see on the premises, in addition to the bar and dance hall, a room which was used for the purpose of gambling? A. Yes.

Q. Was that a large room? [105]

A. No; not a large room. I would say about 25 feet square.

Q. What gambling equipment was located in this room during the time September, 1949, to December 31, 1949? A. I recall a crap table; twenty-one.

Q. Was there a poker table?

A. I am not positive of that.

Q. Were any slot machines there? A. Yes.

Q. How often were you in the Ace High Club and in the gaming room in the period September to December, 1949?

(Testimony of William Lehman.)

A. Oh, I would say occasionally, possibly once a week.

Q. On these visits, did you observe gambling going on there? A. Yes; occasionally.

Q. Would you say that was every time you went there?

A. Probably not, because I was pretty busy—oh, during the day, in connection with business, when I was down there, I didn't.

Q. What was your business at that time?

A. Newspaper work.

Q. When was gambling ordinarily carried on, at what time of day?

A. I would recall mostly in the evening.

Q. Did you see Mr. Percifield at these games?

A. I did.

Q. Was he banking, running the games?

A. Yes; occasionally.

Q. Someone else would occasionally be [106] there? A. Yes; there were other people there.

Q. Do you remember who else was there?

A. I don't recall them personally. I don't think I knew them. At the time they were strangers to me.

Q. You operated a newspaper there; did you?

A. Yes.

Q. Did you get advertisements from Mr. Percifield from time to time for the newspaper?

A. Yes.

Q. Now, you were also town clerk of Rangely for a while; were you not? A. Yes.

(Testimony of William Lehman.)

Q. For what period, sir?

A. July, 1950, till April 1, 1955.

Q. Are you familiar with the donations made to the town to the general fund of Rangely by the Ace High Club?

A. I was familiar with the records showing that; yes.

Q. Do you have any knowledge of the purpose of these donations?

Mr. Anderson: Now, we object to this because he was clerk from 1950 to 1955. The record is in evidence, and I submit this is irrelevant and immaterial and not the best evidence.

Mr. Maxwell: Mr. Anderson's interpretation of the testimony is not the same as ours. I understood the witness lived in Rangely from September, 1949, to December, 1949, and must have been familiar with those donations at that time.

Mr. Anderson: All I know is what he [106-A] said.

The Court: I think the witness is entitled to testify whether he knows or not. The objection is overruled for the purpose of permitting the witness whether or not he knows.

A. This was a new incorporated town. There was need of revenue from every possible source that was possible to get it. It would certainly create a favorable public reaction to business.

Mr. Maxwell: I have no further questions.

(Testimony of William Lehman.)

Cross-Examination

By Mr. Anderson:

Q. Now, Mr. Lehman, Mr. Percifield's place of business is about the center of town, I think you testified to that? A. Yes.

Q. I will ask you whether or not you know that other places beside Mr. Percifield made these donations in Rangely over this same period?

A. Yes, sir.

Q. That you know of, how many were there?

A. I am not positive.

Q. Well, about how many?

A. I would say approximately five.

Q. And it was all handled in the same way, as far as you know?

A. To the best of my knowledge.

Redirect Examination

By Mr. Maxwell:

Q. These other five places that made these donations, did they also have gambling on the [107] premises? A. Yes.

Mr. Maxwell: That's all.

Mr. Anderson: That's all.

(Witness excused.)

(Jury admonished and recess taken at 2:30 p.m.)

2:45 P.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

Mr. Maxwell: We have stipulated that the witnesses, Lockett and Fortner, may be excused, your Honor.

The Court: Very well, let the record so show.

ELEANOR JONES

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. Eleanor Jones.

Q. Where do you reside, Mrs. Jones?

A. Meeker.

Q. Meeker, Colorado. Where did you reside in 1948 and 1949? A. Rangely.

Q. Are you married, Mrs. Jones? A. Yes.

Q. Do you have an occupation other than housewife? A. I do bookkeeping. [108]

Q. What was your occupation in 1948 and 1949?

A. Bookkeeping.

Q. Was that for some specific firm or individual, or do you have a business?

A. I had my own office. I do it for several different businesses.

Q. Where was that office located?

A. In Rangely.

(Testimony of Eleanor Jones.)

Q. Do you know the defendant here, Raymond Percifield? A. Yes.

Q. Did you do any bookkeeping work for Mr. Percifield? A. Yes.

Q. When was that?

A. I started the latter part of '47 until about the middle part of '49.

Q. Did you do any bookkeeping work after the middle part of '49 for Mr. Percifield?

A. Yes; but not as regularly.

Q. Now, what were your duties in connection with your employment by Mr. Percifield? What type of record did you keep?

A. I would keep the daily records and expenditures and I would summarize and give a monthly total.

Q. Would you keep what we call summary records? A. Yes.

Q. That wouldn't be the basic records for the business, but rather the secondary records? [109]

A. Yes.

Q. Did you have a conversation with Mr. Percifield at the time he employed you?

A. Yes, in regard to records.

Q. In regard to the books that you were going to keep and he was going to keep? A. Yes.

Q. Can you say just about when that conversation was?

A. The latter part of 1947, I think, and I started there about November of 1947.

(Testimony of Eleanor Jones.)

Q. Was there anyone else present at this conversation? A. Not that I remember.

Q. And can you state what was said with regard to the records to be kept, to the best of your recollection?

A. I asked him to keep a record of receipts and then wrote it down receipts from bar, from the cafe, and lounge. It had to be separated because of sales tax returns, excise tax returns.

Q. You prepared the sales tax returns and excise tax returns for Mr. Percifield? A. Yes, sir.

Q. What other conversation did you have at that time with reference to the records?

A. I asked him to report any cash paid out he might have and checks he wrote and make notation of them, what they were for, on the check stub; to what type of expenditure it was for and [110] any other income he had.

Q. Was that specifically with reference to gambling income?

A. If he had gambling income, I stated to keep records.

Q. He gave you records?

A. I don't think he put it down. He didn't want to show it on the monthly summary.

Q. Did you also ask him to keep track of his cash on hand every day?

A. When I first started, I asked him to keep a running cash balance on hand and keep a cash balance.

(Testimony of Eleanor Jones.)

Q. Now, did you thereafter receive that type of information on cash? A. No.

Q. He didn't keep that. What sort of daily records did he keep?

A. He kept the record of all sales, wrote them down.

Q. Did he keep a record of his gambling?

A. I don't know.

Q. You didn't see it? A. No, sir.

Q. Now, you didn't keep for Mr. Percifield a formal set of records; that is general ledger, double entry system, etc.?

Mr. Anderson: We object to that as leading and we submit he shouldn't put the words in the witness' mouth.

The Court: Objection overruled.

Q. Were the set of books which you kept for Mr. Percifield double entry system and general [111] ledgers? A. No, sir.

Q. Could you have kept such a set of records from the information which he furnished you?

A. No.

Mr. Maxwell: I ask this set of photostats be marked for identification.

The Clerk: Plaintiff's Exhibit 30 for identification.

Q. Now, I will show you plaintiff's Exhibit No. 30 for identification and ask you if you can state what that is, please.

A. This is a list of checks written by Mr. Percifield.

(Testimony of Eleanor Jones.)

Q. For what years?

A. Starting the period January, 1948.

Q. How far does that appear to go?

A. This is missing November, 1948. Part of November is here.

Q. November of 1948 is here?

A. To through December, '49.

Q. Now, does that appear to be a photostat, then, of the original record? A. Yes, sir.

Q. Did you keep the original record there?

A. Yes.

Q. Do you see your handwriting on that all the way through? A. Yes.

Q. Do you have the original of that?

A. No, sir. [112]

Q. Do you know where the original is?

A. No, sir.

Q. From what did you make the entries on that document?

A. From the checks, from the check stubs, and I checked them out with the bank.

Q. Are there also deposits on there?

A. Yes, sir.

Q. Where did you make the entry with respect to deposits?

A. Check stubs that had been added on there, or from the bank statements.

Q. Where did you secure the bank statements and the check stubs? A. From Mr. Percifield.

Q. Did you also have the cancelled checks?

(Testimony of Eleanor Jones.)

A. Yes.

Q. Do you have the cancelled checks and bank statements and check stubs now? A. No.

Mr. Maxwell: I offer plaintiff's Exhibit 30 for identification in evidence.

Mr. Puccinelli: No objection.

The Court: The offer will be received in evidence as government's Exhibit No. 30.

Mr. Maxwell: I have another set of photostats which I would like to have marked for identification.

The Clerk: 31 for identification. [113]

Q. Now, Mrs Jones, I show you plaintiff's Exhibit 31 for identification. That is a set of photostats. Can you tell us what it appears to be?

A. Summary of the bar sales, cafe sales, lounge sales, and also miscellaneous cash paid out.

Q. Did you make the original of that record?

A. Yes.

Q. Do you have the original at this time?

A. No.

Q. Do you know where the original is?

A. No.

Q. From what source did you make up that exhibit 31 for identification?

A. From records kept by Mr. Percifield.

Q. What records were those?

A. Recorded daily sales and cash paid out. As near as I remember, there was a daily cash sheet kept in a bound book.

Q. Do you have those daily cash sheets or bound

(Testimony of Eleanor Jones.)

book at this time? A. No.

Q. Do you recognize your handwriting on Exhibit 31 for identification? A. Yes, sir.

Q. For what period is Exhibit 31 for identification? A. From March to October, 1948.

Q. Do you know where the records for the other months of 1948 and for the months of 1949, that is, the cash receipts records [113-A] similar to this are at the present time? A. No, sir.

Q. You don't have them? A. No, sir.

Mr. Maxwell: I will offer plaintiff's Exhibit 31 for identification in evidence.

Mr. Puccinelli: No objection.

The Court: The offer will be received in evidence as government's Exhibit 31.

Q. Now, do Exhibits 30 and 31 represent the records or books which you kept for Mr. Percifield?

A. Yes, sir.

Q. Did you keep any other records for him than those two? A. I may have had a payroll.

Q. Will you look on Exhibit 30 and see if there is a 9th column on there? A. Yes.

Q. Could you have made up your payroll from that? A. Yes.

Q. Now, does Exhibit 30, which is the check record—I believe you stated summary of Mr. Percifield's checks—does that contain all of the information which you received, with respect to Mr. Percifield's bank deposits and checks?

A. I believe so.

(Testimony of Eleanor Jones.)

Q. And exhibit 31, which is the record of cash receipts and [114] pay-outs in summary form, does that contain all the information which you had during the period for which we have it here, with respect to Mr. Percifield's cash receipts and pay-outs? A. Yes.

Q. Now, on Exhibit 30, the check record, what different columns of expenses and other items did you maintain in that record?

A. Payroll; entertainment expense, out of which was expense for orchestra; heat and lights. Cafe purchases and bar purchases. Those are about the only columns I maintained. The others are general ledger columns.

Q. In other words, you threw everything else in the general ledger? A. Yes.

Q. Now, I will show you an entry on page 4 of Exhibit 30. I wonder if you will read the item, which is two lines above the sixth, under the date of March 15, second from the last entry on that date. Read that item all the way across.

A. March 15, 1949, check made out to Bert Taylor, check 238, amount \$400, general ledger column, charged up to personal expenditure, not an expense of the business.

Q. Then taking that check as an example, you would then put down the date, of course, then the payee's name, is that correct? A. Yes.

Q. Then what would come after that?

A. The check number. [115]

(Testimony of Eleanor Jones.)

Q. Then what?

A. Amount and the distribution.

Q. Which would be under amount, the same amount in another column? A. Yes.

Q. And if it was in a general ledger column, there would be some explanation usually, is that right? A. Yes, the type of expense.

Q. Now Exhibit 30, besides record of the checks itself, also shows a record which you put down from the deposits, is that correct, deposits to the bank account?

A. From the bank statement or checks stubs.

Q. And that would be the First State Bank of Rangely? A. Yes.

Q. The deposits there then are taken from the ledger sheets or the check stubs, is that correct?

A. Bank ledger sheets or the check stubs.

Q. Did you reconcile the bank accounts monthly as part of your duties?

A. I did, yes; I listed the checks monthly and then compared with the check stubs.

Q. To make sure the bank did not credit too much or too little to Mr. Percifield?

A. Yes.

Q. Did you ever try to reconcile the deposits with the cash [116] receipts which were given you on Exhibit 31? A. No, sir.

Q. Did the deposits agree with the cash receipts on Exhibit 31? A. No, sir.

Q. Let us take the first month here, if we can

(Testimony of Eleanor Jones.)

see what the difference is. The first month, page 1, cash receipts record is what?

Mr. Anderson: I do not understand the question.

A. Well, I have to add three figures together to get the total.

Q. Would you like a piece of paper and pencil?

A. I get 5,578.87.

Q. Would you turn to the place in Exhibit 30 where the bank deposits for that month are shown. State what the total deposits are for that month.

A. I have them listed as 8,908.22.

Q. We read that check for 1946 Chevrolet Bert Taylor. How do you show that that was a personal charge?

A. It has a "Per" by it.

Q. In other words, "Per" means personal and it shouldn't be a business expense. Now when you were in doubt—if you ever were—as to the classification of a check, whether it was bar expense or what, did you ever ask any one?

A. I would ask Mr. Percifield.

Q. And what would his reply be? [117]

Mr. Anderson: We object on asking about a general course of conduct and asking what his reply would be.

The Court: I don't think counsel is asking for the exact words, are you?

Mr. Maxwell: No, sir.

The Court: I think what he is trying to get at is what was this witness advised by Mr. Percifield.

Mr. Maxwell: Yes.

(Testimony of Eleanor Jones.)

Mr. Anderson: But he has gone much farther and asked what his reply would be.

The Court: Reframe your question, counsel.

Q. Would Mr. Percifield tell you where to place the checks?

A. He would tell me what type of expenditure it would fall.

Q. Now did you prepare the income tax returns for Mr. Percifield for the year 1948?

A. No, sir.

Q. Did you prepare any information for insertion in the 1948 return if you know?

A. I think I probably made a yearly total of all receipts and expenses, as far as bar, cafe and lounge.

Q. Did you have any information as to gambling receipts? A. No, sir.

Q. Did you have any information as to gambling losses? A. No, sir.

Q. Do you reflect that in your summary [118] sheets? A. No, sir.

Q. Now as to the 1949 return, did you have anything to do with the preparation of that?

A. Yes, sir.

Q. I will show you plaintiff's Exhibit 3 in evidence and ask you if you can state what that is?

A. Income tax return filed for the year 1949.

Q. Does your signature appear on it?

A. Yes, sir.

Q. That is Mr. Percifield's return, of course?

A. Yes, sir.

(Testimony of Eleanor Jones.)

Q. When did you prepare that return?

A. My best recollection it was done during the last week before March 15th.

Q. March 15, 1950? A. Right.

Q. Did you prepare that return at Mr. Percifield's request? A. Yes, sir.

Q. What did you use to prepare the return?

A. Summary record file, the checks, cash paid out, also record given to me of his Nevada Club.

Q. His Nevada Club receipts—did you keep the books for the Nevada Club? A. No, sir.

Q. That was the Nevada Club at Wendover? [119] A. Yes, sir.

Q. Did Mr. Percifield give you information from the Nevada Club? A. Yes, sir.

Q. To place on the return?

A. The books of the Nevada Club.

Q. And in preparing the 1949 figures for the 1949 return, what did you do?

A. I don't understand what you mean.

Q. Well, did you add your summary sheets to find the gross receipts? What else did you do in that respect?

A. I got the yearly totals of receipts and expenses and added the totals that were furnished me for the Nevada Club.

Q. Did you take these figures from daily records Mr. Percifield maintained, or from monthly summaries? A. From my monthly summaries.

Q. When you had compiled your figures for the

(Testimony of Eleanor Jones.)

1949 return, did you discuss them with Mr. Percifield?

A. As near as I remember, as I compiled a figure, I discussed it with him or showed him what the figure was.

Q. Did you have a conversation at that time?

A. I always made a practice to ask if there was any other income or any other losses that should go on the tax return.

Q. What was Mr. Percifield's answer to this question?

Mr. Anderson: We object to it—not sufficient foundation. He is just inquiring about general practice and I do not [120] believe that general practice can be based on a particular case.

Mr. Maxwell: I will withdraw that question.

Q. Did you ask this question of Mr. Percifield?

A. To my recollection, I did.

Q. When was that, approximately?

A. When I got the figures compiled or typed up for the government.

Q. That would be a few days before March 15, 1950?

A. Yes, sir.

Q. Was there anyone else present at this conversation?

A. Not that I remember.

Q. What was Mr. Percifield's answer to the question?

A. That he had no other income or losses that should go on his return.

Q. Did Mr. Percifield, to your knowledge, know that you had no record of his gambling income?

(Testimony of Eleanor Jones.)

Mr. Anderson: We will object to that, if the Court please, because it hasn't been established that there is a gambling income, really.

Mr. Maxwell: Well, certainly a gambling establishment——

The Court: He can ask whether or not there was a return on that particular item. If he did not have any gambling income, the answer would be no.

Mr. Anderson: That wasn't his question. His question was, did Mr. Percifield know she did not have a record of his [121] gambling income?

Q. Did Mr. Percifield know that you did not have a record of any gambling income he may have had?

A. Yes, I knew that I didn't have that record.

Q. Did you ever see any records of his gambling income, if he had some? A. No.

Mr. Maxwell: We have nothing further.

Cross-Examination

By Mr. Anderson:

Mr. Anderson: May this be marked?

The Clerk: Defendant's D.

Q. Mrs. Jones, you say you never had any records of any gambling income at the time you kept Mr. Percifield's books?

A. I don't remember any for the year 1949, which is what we were speaking of.

Mr. Maxwell: 1948 and 1949.

(Testimony of Eleanor Jones.)

Q. You don't remember any for the year 1949 or 1948?

A. If I could see all the records, I could say whether there was any income or not, but I don't have all the records. I don't recall a gambling income given me.

Q. Didn't you just tell Mr. Maxwell that you didn't have any records of any gambling income that Mr. Percifield had?

A. I don't remember of having any.

Q. Is this document, except the pencil down here, the ink part of it, in your handwriting? [122]

A. Well, I see where I have been confused. This is for the Nevada Club——

Q. Would you just answer the question, please?

A. This is in my handwriting.

Mr. Maxwell: Let the witness explain. Give her an opportunity to explain her answer.

Mr. Anderson: That is all I asked her. I offer it in evidence.

Mr. Maxwell: May I take the witness on voir dire?

The Court: You may.

Q. (By Mr. Maxwell): Are the ink figures on this document in your handwriting?

A. Yes, sir.

Q. Are the pencil figures in your handwriting?

A. No, sir.

Q. Do you know who made the pencil figures?

A. No, sir.

Q. Is this writing on the back of Defendant's

(Testimony of Eleanor Jones.)

Exhibit D for Identification in your handwriting?

A. Yes, sir.

Q. Did this document have anything to do with the Ace High Club? A. No, sir.

Q. That is for the Nevada Club?

A. Yes, sir.

Mr. Maxwell: I will object to the admission of the document on the ground it has unexplained figures on it, presumably [123] being offered in toto.

Mr. Anderson: We offer only her writing.

The Court: State to the Court the purpose of the offer.

Mr. Anderson: She said she never had any record of any gambling. The document will reflect on that evidence.

The Court: You offer that for the purpose of impeachment, or do you desire to offer it for some other purpose? The objection may be material if it is offered for other purposes.

Mr. Anderson: We will offer her part of it for impeachment of her evidence as to what she said about the records she had been given.

Mr. Maxwell: Then at this time it is not properly admissible, because the witness has not been able to explain.

The Court: That is your job. We will give her a chance to explain. If she is a little bit confused here and does not have presence of mind to explain voluntarily, it is up to you, counsel, to see that the witness at least has an opportunity to explain her answer, if she is impeached.

(Testimony of Eleanor Jones.)

Mr. Anderson: We offer this in evidence.

Mr. Brown: We object on the ground the proper foundation for impeachment has not been laid. She should have an opportunity to examine it and ask her if she wishes to change [124] her statement.

The Court: She has had an opportunity. He has asked her three times already.

Mr. Brown: I do not think she ever had an opportunity to explain.

The Court: I will give counsel for the government an opportunity to question this witness that she might explain any answer she has or if she wishes to.

Mr. Anderson: At this time?

The Court: Yes, at this time.

Q. (By Mr. Maxwell): Would you care to your answers with respect to having no records of gambling income, in connection with this sheet on the Nevada Club?

A. When you first asked the question, I was thinking of the Ace High Club only. There were gambling receipts from the Nevada Club, yes, sir.

Q. And those are shown on the face of the return?

A. Shown on the return.

Mr. Anderson: We offer the document, if the Court please.

The Court: The offer is received in evidence as Defendant's Exhibit D. It might be noted, for the purpose of the record, that this offer was made and received in evidence for the purpose of impeachment [125] and not for the record of any information made.

(Testimony of Eleanor Jones.)

Q. (By Mr. Anderson): Then, Mrs. Jones, you were in error when you stated——

The Court: Now, just a second, counsel. That is what you stated it was offered for and it is and I see no reason to go farther, unless you have additional testimony you wish to elicit by this exhibit.

Mr. Anderson: We do.

The Court: Very well. Go ahead, counsel.

Q. You were in error when you stated Mr. Percifield never gave you any documents showing gambling?

Mr. Brown: That assumes a fact not in evidence. There is not any evidence she was in error. She might be talking about separate things whether income from the Ace High Club receipts or Nevada Club receipts. The witness was obviously confused.

The Court: Well, gentlemen, I don't think we need to go into this. It was a question in a sense whether the witness knew what she was answering to. She explained that and that is clear enough.

Mr. Anderson: We ask that this be marked Defendant's Exhibit E.

Q. Mrs. Jones, I show you what has been marked Defendant's Exhibit E for Identification as Defendant's Exhibit E, and I [126] will ask you if the handwriting part on that exhibit is in your handwriting? A. Yes, sir.

Q. You made that up, did you?

A. Yes, sir.

Q. Did you type it? A. I suppose so.

Q. Do you know whether you did or not?

(Testimony of Eleanor Jones.)

A. It is my writing; I presume I did.

Q. What has been marked Defendant's Exhibit E for Identification and which you say is in your handwriting, does that bear the correct date that you wrote it?

A. No, that is for the month ending November 30, 1947.

Q. Is that for the correct date, for the period it covered for the month ending November 30, 1947?

A. I guess so.

Q. Now, I show you what has been marked as Defendant's Exhibits F and G and ask you to examine them and tell me whether or not you used them in making up Defendant's Exhibit E?

Mr. Maxwell: I do not think it has been established that the witness has ever seen these documents. Perhaps the proper foundation has not been laid for the question asked by counsel.

Mr. Anderson: That is what I am trying to do here now.

Mr. Maxwell: Why don't you ask her? [127]

Q. Did you ever see Defendant's Exhibit F and Defendant's Exhibit G before?

A. I can't remember.

Q. You can't remember whether you did or did not see them before. Don't they bear your check marks? Do you know whether or not you used Defendant's proposed exhibit for identification F and G in compiling Defendant's Exhibit E?

Mr. Maxwell: I object. The witness says she doesn't know whether she did or not.

(Testimony of Eleanor Jones.)

The Court: Let the witness answer.

A. One copy is dated in October, the first of November, and I don't know whether I did or not.

Q. You don't know whether you used them or not?

A. There should be a summary sheet which would compare when those figures were made.

Q. Now, Mrs. Jones, inviting your attention to Plaintiff's Exhibit No. 3, which is an income tax return for 1949 for Raymond Percifield, and bears your signature here, I will ask you if on the back of that statement attached there, if you made that up also as a part of that income tax return?

A. I typed this sheet up.

Q. Calling your attention to the receipts there, I will ask you whether it shows anything about gambling?

A. Yes, sir.

Q. What does it show? [128]

A. \$968.50.

Q. Then you made up, that income tax return that shows that amount of gambling?

A. Yes, sir.

Q. And signed it as adviser; the one that made it up?

Mr. Maxwell: Which one of the questions are you asking—did she sign it as adviser or the one that made it up?

Mr. Anderson: I believe I will take the one that made it up. That is your signature as having signed it as the one that made it up?

A. Yes.

Q. Mr. Percifield came to you to get you to make this income tax return, did he?

A. Yes, sir.

(Testimony of Eleanor Jones.)

Q. And you were competent and capable of making it? A. I thought so.

Q. You made the calculations of the figures that are shown on this income tax return?

Mr. Maxwell: Which one?

Mr. Anderson: The one I just showed her, Exhibit 3.

Mr. Maxwell: 1949?

Mr. Anderson: Yes. Bears her signature.

A. Yes.

Q. You made that yourself? A. Yes.

Q. Mr. Percifield did not have any part in making the computations [129] on the return?

A. No, sir.

Q. Showing you on Schedule 3 the computations on the last part of that schedule, I will ask you if there is any error there? A. Yes, sir.

Q. Mr. Percifield did not do that?

A. No, sir, I did that.

Q. Now, Mrs. Jones, directing your attention to Plaintiff's Exhibit 30, on page 4 thereof, and the check that you have marked there Bert Taylor, 1946 Chevrolet, as 228, has that been marked over or not, the number of that check?

Mr. Maxwell: Possibly the witness can tell from the photostat; that is larger than the original records.

Mr. Anderson: We assume the witness can answer.

A. In my handwriting—it looks like I may have written that over.

(Testimony of Eleanor Jones.)

Q. Do you know what the number was?

A. The check was number—let me see, I may have made an error.

Q. Would you say you did or you did not write over a number there? A. It looks like I did.

Q. Do you know what the other number was before you wrote over it? A. No, sir.

Q. Do you know the Bert Taylor that that check was made out to? [130]

A. Not personally, no.

Q. Do you know whether he is here as a witness or not? A. I understood that he was.

Q. You understood there was a Bert Taylor here. Do you know what initials the Bert Taylor the check for \$400 was made out had, if any? Do you know whether he had any initials beside Bert Taylor? A. State the question again.

Q. Do you know whether he was known as Bert W. Taylor or Bert L. Taylor, or what?

A. No, sir.

Mr. Anderson: We would like to have this paper marked.

The Clerk: Defendant's Exhibit H.

Q. Do you at this time, Mrs. Jones, have any recollection of where you got the information about this \$400 check? Do you remember now?

A. I would have to look up the records. I have no recollection.

Q. You have no independent recollection?

A. No, sir.

Q. I show you what has been marked as Defend-

(Testimony of Eleanor Jones.)

ant's Exhibit H and ask you to examine that and say whether or not that is the check that is entered on the record there? A. Yes, sir.

Q. Is that the check? A. Yes, sir. [131]

Mr. Anderson: We will offer Defendant's Exhibit H in evidence.

Mr. Maxwell: No objection.

The Court: The offer of Defendant's Exhibit H for Identification will be received in evidence as Defendant's Exhibit by that number.

Q. Now, Mrs. Jones, I will ask you to please examine this Defendant's Exhibit H and advise us, if you can find anything on that check that says what it was given for? A. No.

Q. Defendant's Exhibit H, I will ask you to look at that and tell us what name it is made out in?

A. Bert L. Taylor.

Q. Not Bert W. Taylor? A. No.

Q. Mrs. Jones, showing you what is marked Plaintiff's Exhibit 30, I will call your attention to page 14 of that Exhibit 30, and I ask you to look at the check listed there as 246 and tell me if that is in your writing; dated May 5, 1948. Where is page 14 of this record? A. Here.

Q. Now, calling your attention to check No. 246 for a thousand dollars, is the writing there beside that number in your handwriting?

A. No, sir. [132]

Q. Now, on the exhibit that you have before you, Mrs. Jones, is all of the entry that is made there in your handwriting, except the number of the page?

(Testimony of Eleanor Jones.)

The Court: What record is that?

Mr. Anderson: It is Plaintiff's Exhibit 3.

Mr. Maxwell: I believe it is 30.

Mr. Anderson: I beg your pardon.

Mr. Maxwell: Are you referring to our Exhibit 30, on which page?

Mr. Anderson: No. I will try it again.

Q. Does all that appears on the line where check No. 246 is entered on this exhibit in your handwriting?

Mr. Maxwell: If you can tell.

Mr. Anderson: Well, I suggest to the Court please, that counsel has no right to inject things like that in and try to tell how the witness should answer, and I except to that.

The Court: As a matter of fact, you are both experienced. I don't know there is anything the Court can do about it.

Q. Would you answer the question please?

A. The check number and amount and the little check beside it, which shows the check cleared the bank, and the distribution, is in my handwriting. Now the payee is not. I do not know who printed that in there.

Q. I show you what has been marked as Defendant's Exhibit I and [133] ask you to examine that and tell us whether or not that is the check that is represented as 246 on Plaintiff's Exhibit 30?

A. Yes, sir.

Q. That is the check?

(Testimony of Eleanor Jones.)

A. Yes, sir, that is represented as 246.

Mr. Anderson: I offer this check in evidence.

Mr. Maxwell: No objection.

The Court: The offer on the part of the defendant will be received in evidence as Defendant's Exhibit I.

Q. Do you know why you did not fill in the name of the payee on that check?

Mr. Maxwell: Objected to as calling for conclusion of the witness.

The Court: If she knows——

A. I imagine——

The Court: No; don't imagine.

A. Usually the payee would be right down there on the check stub when I listed the check and I probably failed to list it in.

Q. You did check the checks when you got them back from the bank with the record, did you not?

A. Yes, sir.

Q. The check didn't clear through the bank without any payee on it, did it? A. No, sir.

Q. Now, I call your attention to Plaintiff's Exhibit 31, where [134] it purports to make certain distribution of monies. I will ask you why, if you know, they were not totalled up for tax purposes, the figures you have on these different distributions?

A. I am sorry, I don't understand the question.

Q. You do not know why you did not add those up for tax purposes?

A. They are not added here. I do not know

(Testimony of Eleanor Jones.)

whether they were added on his tax return or not. They are not added here.

Q. That is your bookkeeping, is it?

A. Yes.

Mr. Anderson: Your Honor please, we have some more documents that this witness made up and we would like to ask her about them. They are here in the city, but they are about five blocks from here.

The Court: If you haven't them here——

Mr. Anderson: We haven't finished with her.

Mr. Maxwell: We have some redirect.

The Court: I think the government should go on with its redirect and then have these documents marked.

Mr. Anderson: Very well.

Redirect Examination

By Mr. Maxwell:

Q. I show you what has been marked Defendant's E for Identification, together with Defendant's Exhibits G and F for Identification. What is this Exhibit E again? [135]

A. Sales tax returns.

Q. To the State of Colorado? A. Yes.

Q. For what date is it?

A. For the month of November, 1947.

Q. Do you recall—when would it have been made up in the ordinary course of your duties?

(Testimony of Eleanor Jones.)

A. Some time between the first and 13th or 14th of the following month.

Q. In other words, some time between the first and 13th of December. Do you recall when you made this one up? A. December 18, 1947.

Q. I believe you testified previously that you came to work there the latter part of 1947, November or December, is that correct? A. Yes.

Q. Now, did you prepare that return from your summary records that are here in evidence, at least photostatic copy, or did you prepare it from the daily cash sheets, that type of return?

A. These were prepared from my summary sheets.

Q. And your summary sheets were prepared from the daily sheets? A. Yes.

Q. Now, did you work there in October, 1947?

A. I don't believe so.

Q. I will show you Plaintiff's Exhibit No. 3 in evidence, and ask you to look on the second page there and tell me what the [136] second schedule there is, the second page of that return.

A. It shows receipts for the Nevada Club, cost of sale and the expenses.

Q. Does it show gambling receipts for the Nevada Club? A. Yes, sir.

Q. You didn't keep any record of the gambling receipts from the Nevada Club, did you? You didn't keep any summary sheets or records of any kind of the gambling income of the Nevada Club, either monthly summary or daily sheets, or anything of

(Testimony of Eleanor Jones.)

that sort? A. No, sir.

Q. What did you have then at the end of the year, to the best of your recollection, to prepare that typewritten sheet there showing income from the Nevada Club?

A. I had the totals for the year of the receipts and expenses or else I obtained the totals from the books.

Q. You say you had the books or a summary sheet? Does Exhibit D assist your recollection in that respect?

A. I had the books. I didn't have the totals. I made up the totals myself from the books.

Q. Do you recall what type of books you had for the Nevada Club?

A. I don't recall the exact type of books.

Q. Were they summary sheets, similar to the ones you kept for the Ace High Club?

Mr. Maxwell: Objected to—she says she doesn't recall. [137]

The Court: He just tried to refresh her memory. Objection overruled.

A. These are monthly totals which were typed from the books which had daily sheets.

Mr. Anderson: May the record show referring to "these," you are referring to Exhibit D.

A. Yes, Exhibit D.

Q. And Exhibit D shows monthly totals?

A. Yes, sir, on the receipts.

Q. Does that assist you in determining what

(Testimony of Eleanor Jones.)

type of record you may have had available from the Nevada Club?

A. My best recollection is some sort of a book, some kind of record book.

Q. Were they recorded in summary form or daily? A. I don't know; probably daily.

Q. Now, did you have the Nevada Club books during the years 1948 and 1949, other than to prepare the 1949 return? A. No, sir.

Q. Did you have anything to do with keeping those books? A. No, sir.

Q. There is an error in addition on the return there. Show me where that is, please?

A. On the depreciation schedule. I added \$3,000; it should have been \$3,100.

Q. In other words, he was entitled to about \$100 more depreciation? [138] A. Yes, sir.

Q. Will you look at the income tax return and see if that error made any difference in the amount of tax paid? A. No, sir.

Q. What amount shows on the return?

A. Loss of \$3,921.07.

Q. In other words, your error would add another \$100 to that, is that correct? A. Yes, sir.

Q. So that should have been a loss, should have been \$4,021.07? A. Yes.

Q. Now, I will show you Defendant's Exhibit H in evidence, in the amount of \$400. That is the check to Mr. Taylor? A. Yes.

Q. Did you make the entry in Exhibit 30, referring to the '46 Chevrolet, \$400, from that check?

(Testimony of Eleanor Jones.)

A. From this check?

Q. Yes.

A. No, I probably made it from the check stub.

Q. Now, is there any explanation why the purpose of the expenditure is on the face of the check?

A. No, sir.

Mr. Anderson: We move what she made it from be stricken as wholly immaterial. It is a conclusion of the witness. [139]

Q. In the ordinary course of your business——

Mr. Anderson: We would like a ruling on that, your Honor.

The Court: Overruled.

Q. In the ordinary course of your business, where do you make these entries on the checks from?

A. From the listed checks or the check stubs.

Q. When you did not know the purpose of the expenditure, would you ask Mr. Percifield?

A. I would ask Mr. Percifield.

Q. And he would tell you? A. Yes, sir.

Q. I will show you Defendant's Exhibit I, which is a check from the Ace High Club, Raymond Percifield, to the order of the Nevada Bank of Commerce, one thousand dollars. Did you make the entry in Exhibit 30, your check register, from this check?

A. To my best recollection, it was made from the check stub.

Q. I believe you testified that the name of the payee in that entry is not in your handwriting, is

(Testimony of Eleanor Jones.)

that correct? A. Yes.

Q. Would the payee then have been denominated on the check stub at the time you made the entry?

A. Well——

Mr. Anderson: If the Court please, if she knows.

The Court: That is what he is trying to find out, counsel. [140]

A. No, it wouldn't.

Q. Now, you testified about some written-over figures here, is that the check that was on the '46 Chevrolet to Bert Taylor? I believe you testified that that may have been run over, is that correct?

A. Yes.

Q. If you had your original records, you could tell better whether it had been run over?

A. Yes, sir.

Q. Mrs. Jones, from information which you secured from Mr. Percifield, could you have kept any more complete set of records that you did keep?

Mr. Anderson: We object to that, repetition, your Honor. He went into that once.

The Court: Objection overruled.

A. I could not keep a complete set from the records, no.

Mr. Maxwell: I think that is all of the redirect, your Honor.

Mr. Anderson: We would like to waive any further cross-examination before we ask any more questions.

(Jury admonished and recess taken at 4:30 p.m.) [141]

February 16, 1956—10:00 A.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

The Court: Let the record show that this is the 4th day of the trial of the United States of America vs. Raymond Percifield, No. 12,822. You may proceed, gentlemen.

Mr. Maxwell: I believe Mrs. Jones was on the stand. Counsel desired more cross-examination.

MRS. JONES

having been previously sworn, resumed, testified as follows:

Cross-Examination

By Mr. Anderson:

Q. Mrs. Jones, I show you Defendant's Exhibit I, which is the check made out to the Nevada Bank of Commerce, and I will ask you if I am correct that you testified yesterday that you made that out and posted it from the check stub and not the check?

A. At this time I can't remember. If the entry was on the check stub, I made it from the check stub. If the check stub was not filled out, I would have gotten it from the check.

Q. Do you recall whether you testified yesterday that you did make it out from the check stub?

A. I testified, I believe, that I thought the entry was made from the check stub.

Q. Now, I ask you, if it wasn't made from the

(Testimony of Eleanor Jones.)

check stub, it [142] was made from the check after it was returned from the bank?

Mr. Maxwell: I object; the witness has answered the question twice.

The Court: Objection sustained.

Q. Do you know at what time, with reference to the issuance of the check, you made the entry in the book, whether it was from the cancelled check or the check before it was sent out?

Mr. Maxwell: Objected to as having been asked and answered.

Mr. Anderson: I do not so understand that question.

The Court: I think so. Objection sustained. Let's get moving along, gentlemen.

Q. I show you, Mrs. Jones, what has been marked as Defendant's Exhibit J, which purports to be a check stub of check No. 246, and I will ask you to examine that and compare it with Defendant's Exhibit I and tell us, if you know, whether or not the check came from Defendant's Exhibit J. If the stub is the same as that check?

A. I am sorry; I didn't follow the question.

The Court: I was going to observe that the question did not sound intelligible to me. It was rather complicated.

Mr. Anderson: I will reframe it.

Q. Can you tell us, did this check, which is Defendant's Exhibit I, come from the stub which is marked as Defendant's Exhibit J, [143] which you now have before you?

(Testimony of Eleanor Jones.)

A. May I see the listing of the checks to correspond?

Mr. Maxwell: Exhibit 30.

A. Yes, that is the corresponding check stub.

Q. Then the check stub on Exhibit J is the check, Defendant's Exhibit I?

Mr. Maxwell: Obviously the check stub isn't the check.

Mr. Anderson: I didn't mean it that way.

The Court: What was that again?

Mr. Anderson: I will reframe the question.

Q. Is the check stub, Defendant's Exhibit J, the stub from which Defendant's Exhibit I was torn?

A. It appears to be, but these numbers I put in. They are not prenumbered checks and they could have been torn off by some one other than myself but it does look as if it is the number placed on the stub.

Q. Were the check numbered, do you know, before they were sent out or at the time of the writing?

A. I imagine.

Q. Well, do you remember if they were?

A. They were.

Q. Do you say the checks were numbered in any case after they came back from the bank?

Mr. Maxwell: Objected to as incompetent and irrelevant [144] —did she say.

The Court: Objection sustained.

Mr. Anderson: We will offer in evidence Defendant's Exhibit J.

Mr. Maxwell: May I inquire, is Defendant's Ex-

(Testimony of Eleanor Jones.)

hibit J only the check stub for No. 246, or the entire check stubs?

Mr. Anderson: No, just the one check stub. We will tear it out if necessary. That is all we are offering.

Mr. Maxwell: I wouldn't want it torn out, counsel. We have no objection to it in its present form.

The Court: The offer on the part of the defendant is received in evidence as Defendant's Exhibit J.

Gentlemen, the Court would like to make an observation. We spent a great deal of time yesterday afternoon and didn't proceed very far with the case in chief. You have every right to be as exhaustive as you see fit in your examination of the witnesses, both on direct and cross-examination, and the Court does not want to restrict that, but I will say frankly, it looks as though we were beginning to get out on collateral and irrelevant and immaterial matters and spending a lot of time, my time as well as the jurors'. You may proceed.

Q. Mrs. Jones, I show you what has been marked as Defendant's [145] Exhibit K and ask you to examine that and tell us whether or not that document is in your handwriting?

A. Yes, sir.

Q. You made that up, did you?

A. Yes, sir.

Mr. Anderson: We offer Defendant's Exhibit K in evidence.

Mr. Maxwell: I will object on the ground, first,

(Testimony of Eleanor Jones.)

no proper foundation laid; second, that the proffered exhibit relates to a year other than that in litigation.

The Court: What is this paper or document, to start with?

Mr. Anderson: I may say in explanation, if the Court please, that we have marked the offer in evidence, two exhibits here——

Mr. Brown: Just a moment. If this is in the nature of an offer of proof, it should be made out of the presence of the jury.

Mr. Anderson: It is not an offer of proof.

The Court: What is your purpose, counsel?

Mr. Anderson: The purpose is to show that this witness did see the items on this exhibit, which she denied yesterday.

Mr. Maxwell: The witness did not deny seeing them. She said she did not remember if she saw those exhibits and I object to misstatement of the witness' testimony. [146]

Mr. Anderson: I object to counsel's statement.

The Court: I assume that both the jury and the Court recall just what the witness' answers were at least.

Mr. Maxwell: Your Honor, that document certainly has not been identified and no foundation laid at all.

The Court: Objection sustained.

Mr. Anderson: Well, we will try a little further.

Q. I believe you said, Mrs. Jones, you made the

(Testimony of Eleanor Jones.)

Defendant's Exhibit K, that is in your handwriting?

A. Yes, sir.

Q. What is that document and what is it used for?

Mr. Maxwell: We object to what it is used for. She certainly may say what the document is.

Q. What is the document?

A. A summary of the office, October to December, 1947, distribution of income and expenses for the Ace High Club, Rangely, Colorado.

Mr. Maxwell: I object to any further testimony with respect to that document, in view of the fact it relates to a year other than that in the indictment.

The Court: Mr. Anderson, you said the entire purpose of this is impeachment of the witness.

Mr. Anderson: Yes.

Mr. Maxwell: May it please the Court, I do not believe [147] it is impeaching. She certainly hasn't testified anything contrary to that testimony.

The Court: Objection sustained.

Mr. Anderson: May we make an offer of proof?

The Court: On the basis of impeachment?

Mr. Anderson: Yes, because as we understand——

The Court: (Interceding.)

The Court: I will rule on that.

Mr. Anderson: May we make the offer of proof of these exhibits here. We offer these exhibits in evidence, which are Defendant's Exhibits F and G.

The Court: The Court will not admit them at

(Testimony of Eleanor Jones.)

this time, if you want to tie them on your motion, because that is something else. You spent all yesterday afternoon on the general basis of impeaching this witness and that was done. Now, I don't see where we can add anything in particular by going on another day.

Mr. Anderson: I believe we will ask that the record show exception to the remarks of the Court in the presence of the jury.

The Court: The record may so show. I call to your attention, ladies and gentlemen, at the conclusion of this case you will receive instruction from the Court, to the effect that if, during the course of the trial, there are any remarks or [148] any conduct on the part of the Court that would seem to indicate to you the Court intended to infer anything, either for or against any witness or for or against either of the parties to this action, no such inference was intended and you are to disregard and entirely wipe such thought from your mind. The Judge is required to maintain an orderly procedural method to a case and is required to expedite when necessary.

Mr. Anderson: Before we go further on this branch of cross-examination, we will reoffer Defendant's Exhibits F, G, and K, as bearing on the main issues in the case, in addition to impeachment of the witness.

Mr. Maxwell: I again will object to the proffered exhibits, on the ground no proper foundation has been laid for impeachment and the exhibits are

(Testimony of Eleanor Jones.)

incompetent, irrelevant and immaterial to any of the issues in this case.

Mr. Anderson: We would like to observe that we attempted to lay the foundation; it was objected to and I will add as to the further exhibits that they are which we claim are specified in the last exhibit we offered, which is K.

The Court: The Court does not recall whether you were ruled out in an attempt to lay a foundation or not at this time. Do you recall, counsel?

Mr. Brown: I believe I objected to the method of impeachment, your Honor. [149]

The Court: That is my thought, counsel. That objection did not go to laying the foundation. I do not think the foundation has been laid properly.

Mr. Anderson: I will see if I can lay it.

Q. Referring to Defendant's Exhibit K, proposed exhibit, and Defendant's Exhibits F and G, I will ask you if you can look at these exhibits and tell us whether or not the Exhibits F and G were used in making up Defendant's Exhibit K?

A. From that record I can't tell.

Q. What other record would you use?

A. I would have to have the summary record.

Q. I show you Defendant's Exhibit E and ask you if you are now able to say whether or not any of the information on Defendant's proposed Exhibit K entered into Defendant's Exhibit E, which you said yesterday, I believe, you made up.

Mr. Maxwell: We object as calling for conclusion of the witness; whether any of the information

(Testimony of Eleanor Jones.)

is included or went from one exhibit to another, it seems to me would be apparent on the face of the exhibit. It certainly does not go to lay foundation for impeachment.

The Court: No, the impeachment evidence is ruled out. The witness may answer if she knows. No one would know better than she.

A. As I understand your question, was this used to make up this?

Q. No, were these two used to make up this? [150]

Mr. Maxwell: May the record show what exhibits you are referring to?

Mr. Anderson: Our proposed Exhibits F and G, used in making up our proposed Exhibit K.

A. This was not used primarily. This was made up from the summaries, not from daily records.

Q. Do you know whether or not these two daily records entered into this Exhibit K?

Mr. Maxwell: Objected to as asked and answered.

The Court: That has been asked and answered.

Q. What information would you have to have to determine whether or Defendant's Exhibits F and G were used in making up Exhibit K?

A. I would have to have complete daily records, summary of the daily records, in order to see if they are in these figures.

Q. Did you make a summary of the daily records?

Mr. Maxwell: What period are you referring to?

(Testimony of Eleanor Jones.)

Mr. Anderson: For the period she made this up.

Mr. Maxwell: What period is that?

A. 1947.

Mr. Maxwell: I will object to any further testimony as to 1947. We are involved with 1948 and 1949.

Mr. Anderson: If the Court please, as I remember, the witness testified to a state of facts that was contrary to this. Of course, this goes to impeachment, but it the question of [151] whether or not some of the contentions of the government were actually as they contend for and it goes to impeachment and also the main issues of the case.

Mr. Maxwell: Impeachment has been ruled on.

The Court: The witness has answered all of your questions in relation to it, hasn't she?

Mr. Anderson: I don't know about that.

The Court: If you think she hasn't, ask them again.

Q. I show you, Mrs. Jones, what has been marked as Defendant's Exhibit L, and I will ask you to examine that and tell us whether it is all in your handwriting on the face of it. Not the back. There is another marking. All three sheets.

A. Yes, sir.

Mr. Anderson: We offer this in evidence.

Mr. Maxwell: I object on the ground no foundation has been laid. I don't even know what that piece of paper is.

Mr. Anderson: It shows on its face.

(Testimony of Eleanor Jones.)

The Court: I think the Court is entitled to know it and the jury is entitled to know.

Mr. Anderson: I can go into it further.

The Court: Yes, let the jury know about this.

Q. What part did this record play in making up of the income tax?

Mr. Maxwell: I object to that. Let us find out what this record is first. [152]

The Court: That is what we want to know.

Q. What is that record?

A. The work sheet I prepared of summary of monthly expenses and income from the Ace High Club.

Q. What year?

A. 1948. Some of these totals are not my figures.

Q. Calling your attention to this amount here——

Mr. Maxwell: I object to reading from a document not in evidence.

Mr. Anderson: Well, if the Court please, no one has proposed to read from the document. I merely called her attention to a line.

Q. Calling your attention to this line here on page 3, is that in your handwriting?

The Court: This is at the moment merely marked for identification.

Mr. Maxwell: Yes, your Honor. I object to that as not——

The Court: Objection sustained.

Mr. Anderson: We offer it in evidence, if your Honor please.

(Testimony of Eleanor Jones.)

Mr. Maxwell: May I ask the witness on voir dire?

The Court: You may.

Q. (By Mr. Maxwell): You said some of these figures on these [153] sheets in Defendant's Exhibit L for Identification were not in your handwriting?

A. Yes.

Q. I wonder if you would show me what those are?

Mr. Anderson: We are only interested in the third page, if the Court please, but as the exhibit was all fastened together, we offer it all together, but all we are interested in is the third page.

A. Here.

Q. You are pointing to a total here in ink at the bottom of the first column of figures on page 3, as not in your handwriting? A. Yes, sir.

Q. That is not in your handwriting?

A. No, sir.

Q. And is any part of the total at the bottom of the second column of figures on page 3 in your handwriting? A. No, sir.

Q. And the difference of the two figures and the total below, the line total of the second column of figures, is also in your handwriting?

A. It is a subtraction, not in my hand.

Q. And the total at the bottom of the column of figures in the third column of figures on page 3, that is not in your handwriting? A. No, sir.

Q. Are there any other figures that are not in your handwriting? [154]

(Testimony of Eleanor Jones.)

Mr. Anderson: I think we can save time. We are only offering what is in her handwriting.

Mr. Maxwell: Well, let us find out what is in her handwriting then.

A. I think that is the only ones that appear not in my handwriting.

Q. Can you tell me when this was made up?

A. It was made up January or February of 1949.

Q. And can you tell me what you used to make it up?

A. I used the monthly summaries of the income and expenses.

Q. You are referring to the original records, of which Exhibits 30 and 31 are photostats?

A. That is part of them.

Q. There were some other records that you used in addition to them?

A. Yes, sir.

Q. Which are not in evidence?

A. I do not believe they are.

Mr. Maxwell: We have no objection.

Mr. Anderson: As I said before, I would like to take off the first two sheets.

Mr. Maxwell: Oh, your Honor, the entire exhibit has been offered. I want those first two sheets.

The Court: Very well, the defendant's offer will be received in evidence as Defendant's Exhibit L.

Q. (By Mr. Anderson): Now, calling your attention to the last line on page 3 of this exhibit, will you read the last line there?

(Testimony of Eleanor Jones.)

A. The depreciation building, cost \$50,000; 20 years, \$2,500 a year.

Q. In other words, the depreciation part at that time was figured on a \$2,500 a year basis?

Mr. Maxwell: I object. The witness is not qualified as an expert accountant and cannot testify as to the proper basis for depreciation.

Mr. Anderson: I am not asking her the proper basis.

The Court: If she knows, she may answer.

A. I figured that on a 20-year basis.

Q. Now, Mrs. Jones, I believe you heretofore testified that you signed and made up defendant's income tax return, which is Plaintiff's Exhibit 3?

A. Yes, sir.

Q. You made up the schedules attached, these schedules attached to it? A. Yes, sir.

Q. Now, calling your attention to Schedule 3, on what basis did you figure the depreciation on that schedule on that income tax return, Plaintiff's Exhibit 3?

A. I believe this was on the basis of the return filed in 1947.

Q. That doesn't answer my question. What basis did you figure [156] the depreciation of the Rangely buildings on that schedule?

Mr. Maxwell: I object—the witness has answered in the first place she said on the basis of the return filed in 1947; secondly, he is trying to pick a figure out of the return and the document speaks for itself.

(Testimony of Eleanor Jones.)

Mr. Anderson: May I observe, your Honor, they have been reading from the exhibits. Now, at this point they raise the question.

The Court: You are doing more than reading from the exhibit now, but if the witness understands the question, she may answer.

Q. Do you understand my question?

A. No, sir.

Q. On what basis did you figure depreciation in this income tax return, which you say you made?

A. From the 1947 return.

Q. Will you read from this exhibit on Schedule 2, the lines under Ace High Club, Rangely, Colorado. Will you please read that to the jury?

A. Building, date purchased October, 1947, cost \$50,000, basis of depreciation 40 years, depreciation allowed \$1,550.50. Remaining cost \$41,437.50. Depreciation for 1949, \$1,250.

Q. Thank you. Then, as I understand, Mrs. Jones, on this work sheet you took the depreciation 20 years and on this income tax return it is 40 years?

Mr. Maxwell: Objected to as argumentative, asked and [157] answered.

The Court: It is in evidence. Objection sustained.

Q. In keeping the books for Mr. Percifield, Mrs. Jones, did you know of his paying any interest on any indebtedness during the time that you kept the books?

(Testimony of Eleanor Jones.)

A. I don't remember whether there was any expense of interest or not.

Q. You don't know whether he paid any interest or not?

A. I don't remember any interest expenses.

Q. To refresh your recollection, I show you Defendant's Exhibit L and directing your attention to the last sheet and pen notation at the top of the sheet, I ask you what that notation is?

A. Notation of principal and interest.

Q. A payment on principal and interest?

A. It looks like one payment on principal and interest and I don't know the combination of principal and interest.

Q. On Defendant's Exhibit L, the notation that we just called your attention to, and you say that the notation there, "principal and interest," you don't know whether you put that down as that or it was put on and you were going to check into it.

Mr. Maxwell: The witness' answer is in the record. It is improper.

Mr. Anderson: I am reciting that, if counsel will just bear with me a little while.

The Court: Ask the question.

Mr. Anderson: He interrupted before I could ask it. [158]

Q. Were you using this notation to look up principal and interest when you made the income tax return in 1949 for 1948?

A. I don't follow the question.

(Testimony of Eleanor Jones.)

Q. Do you know when you made this up, this Exhibit L?

A. Some time the first part of 1949.

Q. And you made the income tax return for Mr. Percifield in 1949? A. For the year 1948.

Q. Now, then, did you know when you were going to look this up in 1949 or in January, 1948?

The Court: What?

Mr. Anderson: This principal and interest, the item, the note that is made in her handwriting at the top of the page, and I asked her if it was principal or interest and she didn't know, she made a note to look it up later on.

The Court: Hasn't she answered the entire situation?

Mr. Anderson: I do not believe so.

Mr. Maxwell: In any event, I believe that the question is unintelligible. I certainly don't understand it.

The Court: I have to go along with you, counsel. I don't either.

Q. Do you know, Mrs. Jones, when you put this notation, "Principal and Interest" on this Defendant's Exhibit L?

A. I put the notation down at the time I made the papers up.

Q. Do you know when you made the papers up? [159]

Mr. Maxwell: I object——

The Court: Objection sustained.

Mr. Anderson: That is all.

(Testimony of Eleanor Jones.)

Redirect Examination

By Mr. Maxwell:

Q. Showing you Defendant's Exhibit L in evidence, would this be the summary sheet that you testified on direct examination made up for preparation of the 1948 return? A. Yes.

Q. That is the sheet, in other words, if I understand this correctly, that you made up and gave to Mr. Percifield for his use in having the 1948 return prepared? A. Yes, sir.

Q. Now, would you explain what the figures are on the first page of the sheet? What do they represent generally?

A. Expenses of the Ace High Club.

Q. And the first column represents what expenses? A. Bar purchases for liquor.

Q. And the second represents?

A. Cafe purchases.

Q. And what are the rest of them?

A. Heat and light, wages, entertainment, light, social security tax; there is a column for withholding tax, but not totalled.

Q. Now, on page 2, what are these items represented on page 2, in a general way?

A. More expenses. [160]

Q. Where did the information for expenses on page 1 and page 2 come from?

A. From my monthly summary record.

(Testimony of Eleanor Jones.)

Q. Were there other records that you had available?

A. There are records posted from summary records.

Q. Did you have your check summary records available? A. Yes, sir.

Q. And did you have your cash receipts and expense records available? A. Yes, sir.

Q. In summary form. That is Exhibit 31, I believe. May we have Exhibit 31? You had the original of this photostat, Exhibit 31, available, did you not?

Mr. Anderson: Counsel is leading. This is their witness.

Mr. Maxwell: It calls for a yes or no answer.

The Court: That may be leading. This testimony is rather involved. Now, the witness has before her many documents and sets of figures and it is a confusing job at the best. I think if the question can be identified by directing her attention to it, it should be permitted.

Mr. Maxwell: May I rephrase the question?

Q. Did you have this Exhibit 31 available, or the original of it, in making these up?

Mr. Anderson: Making these up? [161]

Q. Making Exhibit L up? A. Yes, sir.

Q. Now, on page 2 of Exhibit L, will you read the general nature of expenses set out on that page?

A. All of them?

Q. Yes.

A. Insurance; building repairs; telephone; ad-

(Testimony of Eleanor Jones.)

vertising; furniture and fixture column; water; donations; travel; freight; oil; miscellaneous; police protection.

Q. That last one was police protection?

A. Yes, sir.

Mr. Maxwell: I think that will be all.

Recross-Examination

By Mr. Anderson:

Q. The item read for police protection, do you know whether or not that was a night watchman hired? Do you know what made up police protection?

A. If I remember right, it was given to the town marshal.

Q. What for, do you know?

A. Protection around the club.

Q. Now, you have read the columns to the jury on pages 1 and 2 of defendant's Exhibit L; I will ask you to read the columns on page 3 of the same exhibit.

A. Column here for returned checks, deposits. Column for petit cash. Column headed William H. Bacon checks. A net income column of box receipts, bar sales, lounge sales, cafe sales. [161-A] Below that is depreciation notation I made on the building I read before. Furniture and fixtures.

Q. What column is marked income column?

A. The income columns are music box receipts, bar sales, lounge sales, cafe sales.

Mr. Anderson: That is all.

(Testimony of Eleanor Jones.)

Redirect Examination

By Mr. Maxwell:

Q. Referring to the income columns on page 3 on Exhibit L, is there a column there for gambling income? A. No, sir.

Mr. Maxwell: That is all.

Mr. Anderson: That's all.

The Court: Do you wish to retain this witness?

Mr. Maxwell: Yes, your Honor; the government would like to have the witness remain.

The Court: I want to say this—this witness is the person who kept the books of the defendant. In spite of any ruling or observation the Court may have made in connection with the proceedings this morning, the Court does not wish to cut off the defendant from any of his rights of cross-examination; and I want it clearly understood that if counsel for the defendant has any questions or further investigation they wish to make at this time through cross-examination, it will be permitted [162] to the full extent they are entitled.

Mr. Anderson: In view of the Court's statement, we reoffer Exhibits K, F, G and E.

Mr. Brown: We would interpose the same objections.

The Court: Objections overruled. The exhibits will be admitted on the part of the defendant in the order numbered.

(Jury admonished and 15-minute recess taken at 11:00.)

11:15 A.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated

(Mrs. Jones excused temporarily.)

BERT TAYLOR

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your full name?

A. Bert Taylor.

Q. You have been sworn heretofore?

A. Yes.

Q. Where do you reside, Mr. Taylor?

A. Riverton, Wyoming.

Q. Where did you reside in 1948?

A. Rangely, Colorado.

Q. Do you know the defendant?

A. Yes; I do. That is, in '48. I left there in '48.

Q. Where did you go in '48? [163]

A. Riverton, Wyoming.

Q. Do you know the defendant, Raymond Percifield?
A. Yes, I do.

Q. Point him out, can you?

A. Yes. (Indicates.)

Q. Have you ever been in the Ace High Club?

A. Yes.

Q. Have you observed gambling on the premises?
A. Yes.

(Testimony of Bert Taylor.)

Q. What type of games were played generally on the premises?

A. I think blackjack and dice.

Q. Did you observe who was running the games?

A. Not necessarily, no.

Q. Did you observe or do you know, sir?

A. Well, I have been in there at various times and there would be someone running the games, that is all I can say.

Q. Who was running the games?

A. Well, I can't remember the names.

Q. You can't remember the names?

A. No.

Q. Was Mr. Percifield running the games?

A. Oh, I believe I have seen Mr. Percifield working behind the table.

Q. Dealing and banking blackjack——

Mr. Anderson: We object to this leading, if the Court [164] please.

The Court: It is leading. Objection will be sustained.

Q. Now, Mr. Taylor, did you ever have any financial transactions with Mr. Percifield?

A. Yes.

Q. And can you tell me what those were?

A. Well, I sold him a car.

Q. When did you sell him a car?

A. Well, in '48, I believe in the spring of '48.

Q. And what kind of an automobile was it?

A. It was either a '36 or '37 Chevrolet.

(Testimony of Bert Taylor.)

Q. And was the car for the use of Mr. Percifield?

Mr. Anderson: We object to that as calling for conclusion of the witness, and leading and suggestive.

The Court: Well, the question was asked if he knew and to that extent the objection is overruled and he may answer if he knows.

A. Mr. Percifield bought the car for his younger brother.

Mr. Puccinelli: If your Honor please, I think the question calls for a yes or no answer.

Mr. Maxwell: The Court ruled he might answer the question if he knew.

Mr. Puccinelli: I am not going behind the Court's ruling, but I think the question can be answered yes or no. [165]

The Court: Yes, the preliminary question will be answered yes or no.

Q. Then the answer is now no?

A. Well, what is the question?

Q. Do you know for whom the car was intended?

A. Yes.

Q. For whom was it intended?

A. Well, his younger brother; I forget his first name. It was for his younger brother.

Q. And did Mr. Percifield pay you for the car?

A. Well, no. There was nothing involved in it because I owed Mr. Percifield some money at the time and he took the car for the money.

(Testimony of Bert Taylor.)

Q. How much did you owe Mr. Percifield at the time?

A. I don't remember the exact amount, but I think it was around \$200 or \$150.

Q. And when had you become indebted to Mr. Percifield?

A. Oh, I couldn't say exactly. I imagine about——

Q. Was it immediately before he bought the car?

A. No, I would say two or three months before that.

Q. Would you say after the first of January?

A. I can't say. It was in that winter.

Q. Did you have any other financial transactions with Mr. Percifield? A. Nothing. [166]

Q. What was the basis of your indebtedness to Mr. Percifield?

Mr. Anderson: We object to that as immaterial.

The Court: Objection sustained.

Mr. Maxwell: Your Honor, I would like to know what he owed Mr. Percifield money for, wages, or exactly what. I think that is material, what he owed Mr. Percifield money for, whether he had employed Mr. Percifield, or exactly the basis of the debt.

Mr. Anderson: It is immaterial.

The Court: I think it is immaterial. Objection sustained.

Q. Showing you Exhibit 46, a check from the Ace High Club to Bert L. Taylor, will you tell me whether you are the payee on that check, sir?

(Testimony of Bert Taylor.)

A. Well, that isn't my signature, but I believe that is my wife's signature.

Q. You believe that is your wife's signature?

A. I believe it is.

Q. Is your name Bert L. Taylor?

A. Yes, sir.

Q. Do you recall the purpose for which you got this check?

Mr. Anderson: We object; assuming a state of facts not in evidence. It isn't shown he ever got the check.

The Court: My thought that is in effect the question. Ask the question. [167]

Q. Did you ever receive that check, Mr. Taylor?

A. If that is my wife's signature, I received the check. That is all I can say.

Q. Did you receive a check from Mr. Percifield in the amount of \$400?

A. I don't remember.

Q. Did you do anything for Mr. Percifield, whereby you should receive some money from him?

A. Well, I gambled in there.

Q. You think this may be a gambling amount of money, particularly paid to you for gambling?

Mr. Anderson: We object to that as leading and suggestive and calls for what he thinks.

Mr. Maxwell: Your Honor, this is an adverse witness.

Mr. Anderson: But counsel, he isn't going to have any more connection with Mr. Percifield than thousands of other people.

(Testimony of Bert Taylor.)

Mr. Maxwell: I claim surprise. I am entitled to cross-examine.

The Court: The Court is of the opinion no surprise has been shown and if this is a reluctant witness, the Court will correct it and you may proceed with the method of examination.

Q. Sir, is it possible that this is payment to you for monies for gambling debt?

Mr. Anderson: Objected to as irrelevant and immaterial; [168] calling for conclusion of the witness.

The Court: Objection overruled.

Q. What was the question?

Q. Is it possible that you received this check in payment of a gambling debt from Mr. Percifield?

A. It could be possible.

Q. Gambling transactions, plus car transactions, are the only financial transactions you had with Mr. Percifield?

Mr. Anderson: Objected to as leading and suggestive.

The Court: Objection overruled.

A. What was the question?

Q. Are gambling transactions, together with the car transactions you have heretofore testified to, the only financial transactions you have had with Mr. Percifield? A. Those are the only ones.

Q. Did you receive this check in payment for an automobile?

A. Well, that could be possible. I don't remember the amount of this automobile transaction.

Mr. Maxwell: That is all.

(Testimony of Bert Taylor.)

Cross-Examination

By Mr. Anderson:

Q. When did you say you left Rangely, Mr. Taylor?

A. '49. Left there in November, '48.

Q. 1948? A. Yes, sir. [169]

Q. And where did you go to?

A. Riverton, Wyoming.

Q. And were you back to Rangely during the year 1949? A. No, sir.

Q. Or in the year 1948 after you left?

A. No, sir.

Q. Why did you move from Rangely to Riverton?

Mr. Maxwell: Objected to as immaterial.

The Court: Well, yes——

Q. Mr. Percifield, you say this could have been for a car? A. It could.

Q. Did you sell Mr. Percifield a 1946 Chevrolet automobile? A. Not a 1946, a '36.

Q. Now, Mr. Taylor, I will ask you if you know whether or not there were any Bert Taylors in Rangely at the same time you were there?

A. I know there was one other Bert Taylor.

Q. Do you know if there was more than one, beside yourself? A. I don't know at all.

Q. Was he Bert L. Taylor, too?

A. I don't think so. I think his was Bert H. Taylor.

(Testimony of Bert Taylor.)

Q. Was he a carpenter? A. Yes.

Q. Do you know whether or not he did some work for Mr. Percifield? [170]

Mr. Maxwell: Objected to as hearsay.

The Court: You may answer.

Q. Do you know whether or not he did some carpenter work for Mr. Percifield?

A. I don't know.

Q. Do you remember, Mr. Taylor, of ever having in your possession defendant's Exhibit H, this check? A. I don't remember.

Q. Do you remember of ever having seen this defendant's Exhibit H before today?

A. No, sir.

Mr. Anderson: That's all.

The Court: May I have the check, please? Mr. Taylor, I hand you defendant's Exhibit H, the check dated March 15, 1948, made out to Bert L. Taylor, in amount of \$400, signed Raymond Percifield. Will you take that check? Are you presently married?

A. Yes, sir.

The Court: How long have you been married to your present wife?

A. Twenty years, sir.

The Court: I believe you said, in answer to a question, that you hadn't signed that check or endorsed it; it is not your signature, but it might have been the signature of your wife. Is that right? [171]

A. It might have been my wife's signature.

(Testimony of Bert Taylor.)

The Court: During these twenty years, you have observed your wife's signature many, many times?

A. Yes.

The Court: To the best of your knowledge, is that your wife's signature?

A. I believe it is.

Mr. Maxwell: I have no further questions.

(Witness excused.)

Mr. Maxwell: May it please the Court, a conference between counsel for the plaintiff and defendant last night resulted in agreement, which if agreeable to the Court, that the defendant might put on two witnesses out of order at this particular point in the proceeding.

Mr. Puccinelli: That is true, your Honor, we have two witnesses we would like to put on now.

The Court: Very well, you may proceed.

JOYCE PROCTOR

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. Will you state your name to the Court and jury, please? A. Joyce Proctor.

Q. Where do you live, Mrs. Proctor?

A. Meeker, Colorado.

Q. Do you hold any official position in Meeker, Colorado? [172]

(Testimony of Joyce Proctor.)

A. County superintendent of schools.

Q. How long have you been county superintendent of schools? A. Since 1950.

Q. Prior to assuming that position, were you on the school system in Rangely?

A. I was principal of Rangely public schools from 1946 to 1950.

Q. Are you acquainted with the defendant, Raymond Percifield? A. Yes, sir.

Q. How long have you known him, about?

A. Either late of 1947 or early of 1948.

Q. Are you acquainted with his general reputation in the community where he lives?

A. Yes, sir.

Q. About how long have you been so acquainted?

A. Since he came there. His children enrolled in the school.

Q. How many were there? A. Three.

Q. In the school of which you were principal?

A. At the time they enrolled, there were only two. The little girl enrolled in the first grade the following year.

Q. Is Mr. Percifield's reputation in the community he lives good or bad?

A. Well, speaking from the standpoint [173] of—

Mr. Maxwell: We object to the answer of the witness. The answer should be confined to good or bad, I believe.

The Court: Yes.

A. It is good.

(Testimony of Joyce Proctor.)

Q. Now, Mrs. Proctor, you say you went to Rangely when? A. February, 1945.

Q. What kind of community was Rangely?

A. At that time?

Q. Yes.

A. There was no community at that time; one or two buildings, beginning of the oil boom.

Mr. Maxwell: May I ask a question? I believe this witness has testified as to character. Is this witness also to testify to some fact in the case having a direct bearing on the offense?

The Court: Just let counsel bring that out if he wishes.

Mr. Anderson: That is what I intended to prove, the community there generally.

Q. You say it was the beginning of an oil town?

A. It was the beginning of the Rangely oil boom.

Q. How long did the boom continue?

A. The boom, as such, continued, I would say, late '47 or early '48.

Mr. Maxwell: I will object to this as calling for conclusion of the witness, as circumstances of an intangible thing; a boom, unless it can be shown that she is an expert on booms, I would ask that the answer be stricken. [174]

The Court: Well, I think there is some merit to what you say, counsel. We will let the answer stand.

Mr. Anderson: Cross-examine.

(Testimony of Joyce Proctor.)

Cross-Examination

By Mr. Brown:

Q. Mrs. Proctor, you say you have lived in Rangely for how many years?

A. I came to Rangely in February, 1945. I moved to Meeker in 1950.

Q. Have you ever heard of the Ace High Club?

A. Yes, sir.

Q. Have you ever heard of Mr. Percifield's activities in connection with the Ace High Club?

Mr. Anderson: We object to this line of examination, if the Court please, because it is not within the scope of the direct examination. Secondly, it seeks to prove reputation or character with respect to particular conduct or particular trait.

Mr. Brown: I feel, your Honor, that line of questioning goes to his general reputation. She has testified as to conditions in the town. I wish to inquire if she was aware of the gambling conditions and the connection of the defendant with that and the legality of that particular activity in Colorado, of which she is undoubtedly aware.

Mr. Anderson: If the Court please, if they want to [174-A] use this witness as an expert on the law of Colorado, I think they should call her as their own witness. Secondly, we submit cannot cover a particular trait or act, and I think the authorities are rather clear on that, in this sort of an examination.

Mr. Brown: I think your Honor can take judi-

(Testimony of Joyce Proctor.)

cial note that gambling is illegal in every State in the Union except Nevada.

The Court: Objection overruled.

(Question read.)

Q. You may answer.

A. I would say that I have been in the Ace High Club.

Q. Were you there in 1948 and 1949?

A. I have been in off and on from the time he opened.

Q. You observed gambling conducted at that time? A. I never seen gambling.

Q. How often did you go in the Ace High Club?

A. That I can't say. Probably on week ends, maybe after school we would drop in for a few minutes for coffee. Many evenings I went there a little while to dance. I can't tell you how often.

Q. But you did go in the Ace High Club in 1948 and 1949 quite often, is that correct?

A. I am sure I have been in there very [175] often.

Q. After school?

A. Oh, I have been in the Ace High Club on week ends or after school.

Q. You have never seen gambling there?

A. I have never seen gambling.

Mr. Brown: That is all.

Mr. Anderson: That is all.

(Witness excused.)

MORRIS LANGE

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Puccinelli:

Q. Will you state your name, please?

A. Morris Lange.

Q. Where do you live?

A. At Rangely, Colorado.

Q. How long have you lived there?

A. Ten years.

Q. What is your business?

A. Building contractor.

Q. How long have you been a building contractor?

A. I have been actually a building contractor for four years and I have been working at that trade for twenty years.

Q. Prior to the time you were a building contractor, you were working in that trade? [176]

A. Yes.

Q. Would you explain further in what capacity?

A. As construction foreman and construction superintendent.

Q. In other words, I take it from your testimony, you have been in the construction business in one form or another for the last twenty years?

A. Yes.

Q. Mr. Lange, have you seen the Ace High Club in Rangely, Colorado?

A. Yes.

(Testimony of Morris Lange.)

Q. Have you examined the buildings as to construction?

A. Well, I noticed parts of it being constructed.

Q. You have noticed parts of it being constructed? A. Yes.

Q. Have you noticed the construction of the remainder other than that you saw under construction? A. Yes.

Q. Would you describe what that construction is?

A. Well, the original construction was a frame building and it is now stucco on the exterior.

Q. Would you explain the rudimentary construction, with reference to foundation, on the original or the older property?

A. I would call the foundation more or less temporary foundation.

Q. Then from your experience, Mr. Lange, twenty years connected [177] with the construction business, what would you say the life of that building would be?

Mr. Maxwell: At what particular time? The present time?

Q. When did you examine it last?

A. It has been—I couldn't tell you exactly. Of course, living in Rangely, I go by the building almost every day.

Q. You say you noticed parts of the building under construction? A. Yes.

Q. And when was that?

(Testimony of Morris Lange.)

A. That was, I believe, around 1947.

Q. Now as to that time, what would you say the life of the building would be?

Mr. Maxwell: I object to that. There is no foundation laid for opinion testimony at this time. We haven't determined the extent of the inspection as yet. We don't know what he did, whether he viewed it from afar, whether somebody else built it, or whether he was actually concerned in the building of the building itself. We don't have the facts on which he would base his conclusion.

Mr. Puccinelli: I think, your Honor, please, he saw it, he testified the foundation was of a temporary nature, and he has testified he has worked——

The Court: You may answer.

Q. Do you recall the question, Mr. Lange? [178]

A. Repeat it, please.

(Question read.)

A. I would say approximately twenty years.

Mr. Puccinelli: That's all.

Cross-Examination

By Mr. Maxwell:

Q. Mr. Lange, you say you observed the Ace High Club in 1947 and 1948?

A. Being constructed, part of it.

Q. You are sure it wasn't in the early part of 1947? A. It could have been 1946.

Q. It could have been 1945? A. No, sir.

Q. How about 1944? A. No, sir.

Q. How late could it have been? Could it have been 1949? A. It could have been.

Q. 1948? A. It could have been '48.

Q. Now where did you make your observation from, what point?

A. The time I noticed the construction, I was constructing a building on the opposite side of the street.

Q. You were constructing a building on the opposite side of the street? A. Yes, sir.

Q. The Ace High Club is on the main street in Rangely? [179] A. Yes, sir.

Q. How wide is the street at that point?

A. Approximately 50 feet.

Q. And where were you stopping when you made your inspection? A. Across the street.

Q. You then weren't in a position to see the foundation of the Ace High Club? A. Yes.

Q. You were in a position to see the foundation?

A. Yes.

Q. What do you mean by foundation, Mr. Lange?

A. Foundation of the building is the part of the building that is designed to support the building upon the foundation itself.

Q. The foundation is usually the part of the building that is in the ground, so to speak, isn't that right? A. Yes, sir.

Q. Now when did you go to Rangely?

A. In 1946.

Q. Did you see the building, the original build-

(Testimony of Morris Lange.)

ing, constructed? A. No, sir.

Q. What type of building was the original building? A. Frame building.

Q. Were additions made to the frame building?

A. Yes. [180]

Q. And when were those additions made?

A. In 1946-'47.

Q. And those are the additions which you watched building? A. Yes.

Q. You watched the foundation to the additions going up, but you didn't see the original foundation being put in? A. No, sir.

Q. What was the construction of the additions?

A. Cinder block.

Q. That is pretty good stuff, isn't it?

A. I don't class it as very good building material.

Q. Well, it is better than frame? A. Yes.

Q. As a rule, cinder blocks have a habit of lasting more than twenty years?

Mr. Puccinelli: Objected to as argumentative.

The Court: Objection sustained.

Q. Now how many additions were put on in cinder blocks to Ace High Club?

A. I only noticed one.

Q. Do you know what the size of that addition was? A. Approximately 20 by 40.

Q. That is the only addition that was made to the original frame building?

A. That I observed. [181]

Q. Are there other additions to the frame build-

(Testimony of Morris Lange.)

ing? A. Yes, I believe there are.

Q. And what is the construction material of those? A. They are frame.

Q. And when were they built, if you know?

A. I don't know.

Q. Did you examine those after they were built?

A. No, sir.

Q. When you said the building had a 20-year life, you were talking about the frame building, the original building? A. The whole building.

Q. Which building are you talking about, the original building, the cinder block addition, the other frame additions, or all of them?

A. All of them.

Q. But you only had occasion to watch the cinder block addition go up? A. Yes, sir.

Mr. Maxwell: That's all.

Redirect Examination

By Mr. Puccinelli:

Q. Mr. Lange, you say you observed part of the construction going up? A. Yes, sir.

Q. Do you know who owned the Ace High Club at the time the construction was going on? [182]

A. Mr. Rosa.

Q. That is Joe Rosa? A. Yes.

Mr. Puccinelli: That is all I have.

Mr. Maxwell: That's all.

(Witness excused.)

(Jury admonished and recess taken at 12:05 until 1:30 p.m.)

February 16, 1956—1:30 P.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

JAMES W. BELL

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxewll:

Q. State your name, please.

A. James W. Bell.

Q. Where do you reside?

A. Denver, Colorado.

Q. What is your occupation?

A. I am Special Agent of the Intelligence Unit of the Internal Revenue Service.

Q. Stationed at Denver, Colorado?

A. Yes, I am.

Q. How long have you been a member of the Intelligence Unit? [183]

A. I have been Special Agent since April of 1951.

Q. And were you with the Internal Revenue Service prior to that time?

A. I began employment September 1, 1940.

Q. And what were you employed as?

A. As deputy clerk.

Q. You continued that until you became Special Agent in 1950? A. That is right.

(Testimony of James W. Bell.)

Q. Did you make an investigation as to the tax liabilities of the defendant, Raymond Percifield?

A. Yes, I did.

Q. When did you make that investigation?

A. The investigation was referred to the Intelligence Division on September 22, 1952.

Q. And did you receive the assignment to investigate? A. Yes.

Q. What did you do in making your investigation in September of 1952?

A. Well, on September 30, 1952, Revenue Agent M. E. Thomas and I made a trip to Rangely, Colorado; talked to Mr. Percifield.

Q. Was Mr. Thomas an employee of the Revenue Service?

A. Mr. Thomas was the Revenue Agent who was assigned to participate in the investigation.

Q. You say you went to Rangely, Colorado, on September 30th? [184] A. That is correct.

Q. And what did you do at Rangely?

A. We met Mr. Percifield at his place of business, the Ace High Club.

Q. Who else was there?

A. Mr. Thomas, Mr. Percifield and I.

Q. And the date again, September 30th?

A. That's right.

Q. Was it morning or afternoon?

A. Ten o'clock in the morning.

Q. Will you tell me what was said at that time?

A. Well, I introduced myself and showed Mr. Percifield my credentials. After he looked at them,

(Testimony of James W. Bell.)

I said we would like to talk to him, so he took us back to a booth in the Ace High Club and that is where we had the conversation.

Q. What was said by him in the booth there?

A. I mentioned to Mr. Percifield that we had his 1948, 1949 and 1950 federal income tax returns for investigation and we wanted to ask him some questions about them. I asked Mr. Percifield if he had any objection to answering questions under oath. He said he did not, so he raised his right hand and I asked him, "Will you solemnly swear the answers you are about to give will be the truth, the whole truth and nothing but the truth, so help you God," and he said yes. I asked him questions first about his personal history, his name, his age, place of [185-186] birth, his marital status, his wife's name, his dependents. Mr. Percifield said he was born in Chariton, Iowa, in 1911; that he was married to Mossie Percifield; that he had three daughters between the ages of 9 and 17. At this point I informed Mr. Percifield that he had the right, under the Constitution, to refuse to answer any questions, to refuse to supply any information and any information he gave us or any records that he produced might be used against him in any proceeding, criminal or otherwise, which might hereafter be undertaken by the United States. I also informed Mr. Percifield that he had the right to have an attorney present. I asked him if he fully understood and he said he did. I then went into sources of income. I asked him what sources of

(Testimony of James W. Bell.)

income he had in 1948, 1949 and 1950. He said he purchased the Ace High Club in October, 1947, and that he had owned the Nevada Club, but he did not own it at that time of the interview. I asked him if he had any other sources of income and he said no. I asked him about any non-taxable receipts. I asked him if he had received any gifts, any inheritance, any trust fund. I asked him if he had ever been a beneficiary under a life insurance policy, and he answered no to all those questions. I asked him about cash on hand at the end of 1947. Mr. Percifield said that when he first bought an interest in the Nevada Club, he bought a partnership interest; that they always tried to maintain a five-thousand-dollar bank roll, and that each partner put up half. As far as the Ace High [187] Club is concerned, Mr. Percifield said he only kept money enough for current expenses. He said there was a safe in the Ace High Club that was never used. He said he did not have a safe deposit box and no members of his family had one or were holding any cash for him. I asked him about certain checks, whether he ever owned any stocks or bonds, and he answered that he did purchase or owned any of those items, during that period. I asked him about household furniture. As near as he could remember, the household furniture had a cost value, at the end of 1947, of about \$500; that there had been on change during the period. I asked him about jewelry and furs. The best he could remember on that was about \$150 at the end of 1947; that

(Testimony of James W. Bell.)

there was no change during 1948 and 1949. I asked him about automobiles. Mr. Percifield said that he bought a 1946 Buick in 1946 and that the cost value at the end of 1947 was about \$2400. He said that he held this Buick until some time in 1949, when he traded it for a new Buick purchased in 1949, and he thought the cost value of the new Buick at the end of 1949 was about \$3350. I had the 1948, 1949 and 1950 returns. I presented them separately to Mr. Percifield and asked him to look at them and examine the schedules attached to those returns and tell us whether or not they were his. After he studied them a little while, he said they were his and he said the signatures on those returns were his. I then asked him with respect to the depreciation schedule on the 1948, 1949 and 1950 returns. I asked [188] him about the Nevada Club, what he paid for the business, and asked him about the Ace High Club, what he paid for that business. I asked him a few questions about equipment that he had shown on his depreciation schedule and I asked him about inventory and I think the inventory was shown at \$1275 at the end of 1948, and I asked him if it remained about the same during the period and he said it would remain about the same, at both the Nevada Club and the Ace High Club, during 1948, 1949 and 1950—well, not with respect to the Nevada Club; the Nevada Club, I believe, ceased to do business sometime in May of 1950. I asked Mr. Percifield about gambling, with specific reference to 1948, 1949 and 1950, and his reply was that he

(Testimony of James W. Bell.)

had perhaps a thousand dollars in gambling gain during that period.

The Court: May I ask the witness about that point? You asked him about gambling and he said he had about one thousand dollars in gambling games?

Mr. Maxwell: Gains.

The Court: Was that 1948, 1949 and 1950, that total?

A. That is the way the question was asked and that is the way he answered it. I asked him if he kept any record of his gambling income and he said no. I asked him about his living expenses, what he thought it would cost him to support his wife and three children, and after some discussion he thought it would be about three thousand dollars a year, that is, 1948, 1949 and 1950. [189]

Q. Did he say how he paid his living expenses?

A. Yes, he said most of his living expenses were paid in the form of cash. I asked him about his participation in gambling games and he said he had taken part in twenty-one, dice and poker games. I asked him what records he had maintained for the Ace High Club. He said that he kept his cancelled checks and bank statements and he had always prepared a daily report, either he or Mrs. Percifield had prepared a daily report, which would show the receipts and pay-outs for that particular day. I asked him if his records were available and he said that they were, and I asked him if he would let the agents have them for examination and he said that

(Testimony of James W. Bell.)

he would. I asked him if he had ever made any arrangements for payments to local welfare agencies in return for permission to operate gambling games or similar concessions. He said no.

Q. Did you ask him who prepared his returns?

A. Yes, I asked Mr. Percifield who had prepared his returns. He said Mr. William H. Bacon, Salt Lake City, had prepared his 1948 return, and Mrs. Eleanor Jones had prepared his 1949 return and Mr. Floyd at Truant had prepared his 1950 return.

Q. Did you ask him what he used in preparation for the return?

A. Yes, I asked him what the returns had been prepared from and he said the records that he had furnished to his bookkeeper, Mrs. Jones, and the records that she had kept for him. I asked him if he was aware of the fact the law requires all taxpayers to [190] keep adequate records of income and expenses, and he said he was.

Q. Did you ask him about bribes paid police officials?

A. I asked him if he had ever paid bribes to law enforcement officers and he said no.

Q. Now about the Nevada Club, I believe you said you asked him about his cash on hand and he said he had a partnership interest in the Nevada Club.

A. Yes, to begin with he said he had a partnership interest, but he later purchased his partner's interest.

(Testimony of James W. Bell.)

Q. So he owned the entire bankroll of the Nevada Club?

A. On and after he bought his partner's interest.

Q. Do you know when that was? Was it before 1948? A. Yes, it was.

Q. Did you ask him whether or not he had any accounts receivable or payable at the end of those years in question?

A. Yes, I asked him if anyone was indebted to him and if he had loaned anyone monies, and he said no, that he had no accounts receivable. I also asked him about liabilities. He told us about the Joe Rosa note and he again told us about the \$5500 he had borrowed from his father-in-law, Mr. Fortner, in 1950, and those were the only two outstanding he told me about.

Q. You say \$5500 from his father-in-law?

A. That is right.

Q. Did he tell you about any money loaned to him by Mr. White? [191] A. No.

Q. Or Mrs. Craft? A. No.

Q. Was there anything further said at that interview?

A. Well, it was twelve noon, and my closing statement was, I asked Mr. Percifield if he had received any threats or offers of reward in return for the statement, and he said no. I asked Mr. Percifield if we could resume the interview after lunch and we stopped at about 12:20 for lunch.

Q. Did you thereafter meet with him?

(Testimony of James W. Bell.)

A. Yes, we met with Mr. Percifield in the Ace High Club, the same booth, the same three persons present, at about 1:15.

Q. And the same afternoon?

A. The same afternoon.

Q. Let me get that date again.

A. September 30, 1952. I decided to confront Mr. Percifield with certain information we had at the time.

Mr. Anderson: I object to what he decided to do.

Mr. Maxwell: I expect the objection would be sustained.

Mr. Anderson: I move that be stricken from the record.

The Court: Sustained.

A. We had certain information that had been gathered during that preliminary investigation from the Glenwood Springs Bank. They were holding the escrow papers of the Joe Rosa note and at the time of the interview we had a transcript of that note, showing [192] the original obligation and the total monthly payments that had been made on the note in 1948, 1949 and 1950. I said to Mr. Percifield, "The record of this note discloses a reduction in that liability of \$32,880. In view of what you told me this morning about your living expenses, which would be about three thousand dollars a year, which together would amount to some forty-one thousand dollars, and after deducting the \$5500 loan that you told us about, that there was some \$36,000 of monies, of receipts, that had to come from some

(Testimony of James W. Bell.)

source," and I asked him where it came from. He said, "I told you that I gambled, but I didn't know it was that much." He said, "I have taken part in games in Colorado, Wyoming, Montana, Nevada and Utah." He said, "I even left this place for two or three weeks at a time, I have taken part in dice, twenty-one, mostly poker games." I said, "Mr. Percifield, this is serious business." He said, "I know it is, or you wouldn't be here." I said, "Now do I understand you took these trips from time to time and stayed away from two to three weeks at a time?" I asked him, "Are these gambling trips?" He said, "No, I wouldn't want to put it down that way. I don't like the sound of it." I asked him again if he had kept records of his gambling income and he said that he hadn't. I then asked Mr. Percifield if we could draw up an affidavit wherein he would give his explanation for the apparent omission of \$36,000. He said, "I wouldn't want to sign any statement [193] without my attorney." I said, "Well, may we get the information and draw it up that night and meet with you tomorrow at your attorney's office?" He said that would be all right. So I asked him some more about these monthly payments. To begin with, in 1948 he was paying twenty-two-fifty a month and that continued for about eight months. Then it was reduced to fifteen hundred a month for some time and finally reduced to four hundred a month, but I had this transcript before him and I said, "Now this \$2250 a month that you are paying on that mortgage, is that gam-

(Testimony of James W. Bell.)

bling income?" He said, "Well, no, some months I would win more than that, but I had agreed to those payments. It is just like if you owed me a certain amount of money and you agreed to pay so much a month." And we continued to question him about gambling income. I asked him whether he considered the income from illegal sources to be taxable, and he said no, he did not. He said, "This place in Nevada, it is a regular business, and I know I have to pay income tax on it, but I did not know where you go out and win money in a game that you had to pay income taxes." I asked him again about what records had been maintained at the Ace High Club and he told us again about the daily reports. I asked him what had been shown on these daily reports and he said, "Well, receipts." I asked him what they showed and he said bar receipts, cafe receipts and lounge receipts. I said, "As far as other activities of the club, do you know?" He said, "As far as other activities, I do not know." I asked him again [194] whether he considered income from illegal sources as being taxable and he stopped the statement rather abruptly at that time and said, "I don't want to go on answering any more questions. I don't want to go on answering questions without my attorney. He knows far more about these things than I do and I don't want to get on the hook by incriminating myself. So no further attempts were made to question him. I asked him if he could meet us tomorrow morning with his attorney in Meeker and he said

(Testimony of James W. Bell.)

that he would.

Q. Let me ask if anything was said during your interviews which indicated the scale on which he operated, whether small or large?

A. Oh, yes, I remember one statement. We had the transcript of the note account and in specific figures it was \$36,379. He looked at it and said, "Well, I have seen that much on the table at one time; you don't believe that, do you?" I said yes, I did.

Q. Now then, after the conversation was terminated on September 30, 1952, did you thereafter see Mr. Percifield?

A. Yes, we returned to Meeker—Meeker is about 40 miles from Rangely—and spent the night in Meeker and went over to the court house.

Q. At Meeker?

A. At Meeker, about 9:30, October 1st. Mr. Percifield's attorney was the assistant district attorney in that district and he had his offices in the court house. At about 9:30—Mr. Percifield was there—I didn't know Mr. Balcome, Mr. Percifield's [195] attorney at that time.

Q. Who else was there besides Mr. Percifield and yourself?

A. Well, I hadn't gotten to that yet. Mr. Balcome wasn't there at 9:30 so we had to wait. He came in a few minutes later and then Mr. Balcome and Mr. Percifield went into Mr. Balcome's office and we waited out in the hall.

Q. Who is "we"?

(Testimony of James W. Bell.)

A. Revenue Agent M. E. Thomas and myself. We waited about fifteen minutes and Mr. Balcome called us in. He started out the interview, he says, "I am not familiar with tax cases. Just what is it you fellows want?" I said, "Mr. Balcome, we have the 1948, 1949 and 1950 tax returns for Mr. Percifield for investigation," and that we had interviewed Mr. Percifield on the previous day and that he was shown or informed of the Joe Rosa note, which indicated a deduction in that liability of \$32,800 and that his living expenses had been about three thousand a year, making about \$41,000 and we had taken into consideration a loan he had made from Mr. Fortner of \$5,500 and there was some \$36,000 in disbursements and expenditures that were unexplained and Mr. Percifield had said he gambled, that at no time during the interview on the previous day did he know how much, so we asked him for a statement, so we asked him for an affidavit and he said he did not want to sign any affidavit without his attorney, so I said Revenue Agent Thomas and I would like to have his statement in written form so that we could [196] include it in our report. Well, Mr. Balcome was at first reluctant——

Mr. Anderson: We object to "at first reluctant" as conclusion of the witness.

Mr. Maxwell: I think the objection is well taken.

The Court: Objection sustained.

Q. What did Mr. Balcome say?

(Testimony of James W. Bell.)

A. Well, Mr. Balcome did not want to give us an affidavit at first——

Mr. Anderson: I move that be stricken, as conclusion of the witness.

Mr. Brown: I believe that is something the witness can testify to as a matter of impression.

Q. What did Mr. Balcome say?

A. "Well, I would rather not give you an affidavit at the present time," and he turned to Mr. Percifield and he said, "You can be charged with not only filing fraudulent returns, but if you admit to a specified amount and it is more than that, you admit to, you can also be charged with perjury." I said, "Well, we wouldn't ask Mr. Percifield to admit to a specified amount. If he would say on or about \$36,000, that would be sufficient." It was then suggested that Mr. Percifield admit to the amount paid on the Joe Rosa note during this three-year period. Mr. Balcome and Mr. Percifield thought that that would be agreeable——

Mr. Anderson: We move that go out.

The Court: Yes, the part he testified to what he thought. [197]

Q. What did he say?

A. That he thought that would be——

Q. What did he say, not what he thought. Did he say that would be agreeable?

Mr. Anderson: Now, we would object to that on the ground it is leading.

The Court: Now we all understand that sometimes that thought is another way of saying they

(Testimony of James W. Bell.)

said. The words are not words used in their exact sense.

A. They said that that would be agreeable. Mr. Balcome started talking about prosecution. He wanted to know what the procedure was in these cases and he wanted to know whether or not this case was going to be referred to the United States attorney. I answered Mr. Balcome that we were the examining agents, it was our job to gather the information, the facts, the evidence, and present it in the form of a report; that we were not even considering prosecution at that time, and he talked about prosecution some more, but I said, I just informed him that he was far ahead of the issue at the present time.

(At this point defense witness Charles S. Glenn was sworn and excluded from the courtroom.)

Q. Now, Mr. Bell, I think you were in the middle of conversation with Mr. Balcome, Mr. Perci-field, Mr. Thomas and yourself in Mr. Balcome's office in the county courthouse. [198]

A. Yes, sir.

Q. Do you recall where we were?

A. Yes. Mr. Balcome then called for a secretary to come in the office where the four of us were and he started to dictate the affidavit. Towards the latter part of the affidavit, he asked me, "Can you promise, in the event of a trial, that this affidavit will not be used?" I informed Mr. Balcome we

(Testimony of James W. Bell.)

could make no such promise, the evidence gathered during the investigation was beyond our control. He proceeded to dictate the rest of the affidavit. We waited a few minutes for it to be typed, so after it was typed Mr. Balcome wanted to make some corrections, so he said, "Well, let's stop now for lunch; you come back this afternoon and it will be ready for you. So I went over twice that afternoon; the first time was about 2:00 o'clock. Mr. Balcome was not there. I returned about 3:00 o'clock. The affidavit at that time was ready. It was signed, it was notarized and Mr. Balcome gave me, I think, three or four copies of it. Just as I was going out the door he said, "We will come in; you won't have to send the marshal after us."

Q. You have the affidavit? A. Yes.

Q. Was it handed to you in this folder?

A. No, sir.

Q. You have handed me the affidavit which you have referred to [199] in your previous testimony here? A. Yes, sir.

Mr. Maxwell: I offer this in evidence as government's next in order.

The Court: No. 32.

Mr. Anderson: We object to this exhibit or affidavit on the following grounds: That there is no evidence of any warning at the time of signing this purported affidavit that it would be used against the defendant in the event of a criminal prosecution, that the witness' evidence shows that it was not given freely and voluntarily, and upon

(Testimony of James W. Bell.)

the further ground that the purported document includes income from gambling for 1948, 1949 and 1950, without any segregation as to what the amount was in any year.

The Court: The objection is overruled on every ground. The offer is now received in evidence as government's Exhibit 32.

PLAINTIFF'S EXHIBIT No. 32

Affidavit

State of Colorado,

County of Rio Blanco—ss.

Raymond S. Percifield, being first duly sworn, on oath, depose and says:

1. That he is Raymond S. Percifield, the owner and operator of the Ace High Bar and Cafe in Rangely, Colorado, and is a resident of Rio Blanco County, Colorado.

2. That during the calendar years 1948, 1949 and 1950 he neglected to show all income on income tax returns, form 1040, and attached schedules thereto, and that during those years he received personal income in excess of \$36,000.00, part of which additional income is reflected by payments on one certain promissory note given by this affiant as part of the purchase price of the Ace High Bar and Cafe.

3. That the additional income which was not reported during those three years was obtained

(Testimony of James W. Bell.)

from gambling in the States of Colorado, Utah, Wyoming, Montana and Nevada.

4. That this affiant failed to report income received from gambling enterprises during the above years, through ignorance of the requirements of the Internal Revenue Code in that connection, and he is willing at this time to pay all taxes and penalties properly assessable against him in that connection, and states that at no time did he intend to violate any of the provisions of the Internal Revenue Code or defraud the United States Government.

5. That this affidavit is given voluntarily at the request of James W. Bell, Acting Special Agent, United States Treasury Department, and Michael E. Thomas, Internal Revenue Agent, United States Treasury Department.

6. Further Affiant sayeth not.

Witness my hand and seal this 1st day of October, A.D. 1952.

RAYMOND S. PERCIFIELD.

Subscribed and sworn to before me this 1st day of October, A.D. 1952, by Raymond S. Percifield.

[Seal]

ROBERT D. WHITE,
Notary Public.

My commission expires June 4, 1955.

(Testimony of James W. Bell.)

Mr. Maxwell: May it please the Court, may I read the affidavit to the jury?

The Court: You may.

Mr. Maxwell: Entitled "Affidavit," Exhibit 32.

(Reads Exhibit 32.)

Q. Now, after October 1, 1952, Mr. Bell, did you see Mr. Percifield again? A. Yes. [200]

Q. When was that?

A. On October 1st we had picked up some records, his cancelled checks and bank statements, at Mr. Balcome's office, but they requested that they be returned the next day, that is, before we went back to Denver, so Revenue Agent Thomas and I worked on the cancelled checks and bank statements in the hotel room as hurriedly as we could, so we could return in compliance with their request, and at that time we were anxious to get all the records and Mr. Balcome said he would try to get them together for us, so that was October 2nd when we returned to Denver and six or seven weeks went by and we called Mr. Balcome at Meeker.

Q. Perhaps you did not understand my question. I asked you if you saw Mr. Percifield again?

A. I am leading up to it.

Q. Answer the questions as directly as you can. Can you state the date?

A. Yes, on January 25, 1953, we made another trip to Rangely to get the records and we stopped in first to see Mr. Balcome and he didn't have them, so we continued on to Rangely. We stopped at the

(Testimony of James W. Bell.)

Ace High Club and I wanted to ask Mr. Percifield some more questions, one specifically about his automobiles and he then refused to answer any more and he said, "Mr. Herman and Mr. Feinberg are my accountants and he will have to get the records from them." That is all there was to that interview. [201]

Q. Did you get further records, other than the ones you had in the hotel room, which I believe you just testified to?

A. Yes, we did. On February 3, 1953, Mr. Herman brought the records into the Denver office.

Q. Into your office in Denver?

A. That is right.

Q. Was there any one else there?

A. Yes, Revenue Agent Thomas.

Q. What records did you get at that time?

A. Well, he brought one bound book, which contained the check disbursements, the check register for 1948 and 1949.

Q. Let me ask you if that would be the original of Exhibit 30 in evidence?

A. Well, the pages contained in Exhibit 30 are to the front pages in this book, upon which no entries appeared. It isn't a reproduction of the whole book.

Q. In other words, that is a reproduction of the book on which entries appear?

A. That is right. He also brought in another bound book, which was the cash receipts and pay-

(Testimony of James W. Bell.)

outs, but that was for a limited period, beginning in March of 1948 and ending in October, 1948.

Q. I will show you Exhibit 31 in evidence and ask you if that is what you received at that time, or if you received the original of Exhibit 31?

A. Well, that is just like Exhibit 30. The pages in Exhibit 31 [202] are reproductions of those in the original bound book and these are the only pages upon which any entries had been made.

Q. That you saw? A. That's right.

Q. Did you receive any other records at that time?

A. Mr. Herman brought out the deposit slips and bank statements. We were trying to reconcile bank balances——

Mr. Anderson: We object to what they were trying to reconcile.

Mr. Maxwell: This witness is telling what he did.

The Court: Objection overruled.

A. We were trying to reconcile bank balances as of the end of 1947, 1948, 1949 and 1950 and Mr. Herman sat down with us in the conference room and answered what questions we needed to know.

Q. Did he show you cancelled checks?

A. Yes, he would show us a specific check.

Q. But he didn't show you all of them?

A. No, he didn't show us all of them and I asked him if we could keep them for a while to work on.

Q. The cancelled checks?

A. The cancelled checks, and bank statements.

(Testimony of James W. Bell.)

and he said, no, he was going to take those back with him, but we could have the rest of the records

Q. By that, what do you refer to, the rest of the records? [203]

A. Well, check disbursements, the cash book. Then he had some of these daily report forms.

Q. I have photostats here that depict those report forms.

A. Yes, he had daily sheets, such as you have just handed me, for the period beginning October, 1947, up through February 25, 1948. The photostats here——

Mr. Anderson: We object to the “phostostats here.” They are not in evidence.

The Court: They have just been shown to the witness to identify the type of report he received.

Mr. Maxwell: They may be marked for identification at this time.

The Court: I suggest they be marked before he testify.

The Clerk: Plaintiff’s Exhibit 33.

Q. Tell us what Exhibit 33 for identification is.

A. Exhibit 33 is a portion of the daily reports that Mr. Harman furnished to us for examination, but it is only that portion between October 17, 1947, and October 31, 1947. These are reproductions of those pages of those individual reports that are the only pages on which any gambling references are shown and those are the only pages that were reproduced.

(Testimony of James W. Bell.)

Q. Now, those are part of the records of the Ace High Club, is that correct?

A. Yes. [204]

Q. When you said that Mr. Harmon brought the records in, what records were you referring to, the Nevada Club or the Ace High Club?

A. Oh, the Ace High Club. We never did have any records on the Nevada Club.

Q. You never did have? A. No.

Q. Now, you say you had daily cash slips, similar to Exhibit 33, for what period beside the ones that you caused to be photostated?

A. Well, the daily reports, including this period beginning October 17 through February 25, 1948.

Q. October 17th, what year?

A. 1947, through February 25, 1948.

Q. Did you see any daily cash receipts for a later period? A. No, sir.

Q. Were there any other records that Mr. Harmon brought in to let you examine?

A. There were some copies of sales tax returns, some copies of withholding tax returns, some retained copies of employment tax returns, that is all.

Q. What do you mean when you say retained copies?

A. Well, it is the copy that the employer, in case of an employee, retains in his files.

Q. He files the original and this copy he keeps in his file? [205] A. That's right.

(Testimony of James W. Bell.)

Q. Did you receive any records other than those daily cash slips for the month of October, 1947?

A. No, sir.

Q. Did you receive any records showing receipt of gambling income? A. No, sir.

Q. Did you make investigation with respect to the cash on hand which Mr. Percifield may have had on December 31, 1947?

A. Yes, we did. During that first interview we interrogated him about cash on hand and he told us about the bank roll at the Nevada Club and he told us he didn't have any at the Ace High Club except for current expenses.

Q. Did you investigate his financial status immediately prior to December 31, 1947?

A. Prior to December 31st?

Q. Immediately prior to December 31st.

A. Yes, we found, during the investigation, a record of loans——

Mr. Anderson: We object to what they found. Calls for conclusion of the witness; irrelevant and immaterial.

Mr. Maxwell: I think the witness should be permitted to say what he did. I do not think he used the word "found" in a conclusion sense at all.

The Court: The witness may answer. Objection overruled. [206]

A. We examined the records of the clerk of the district court in Elko County, Nevada, and we found loans——

(Testimony of James W. Bell.)

Mr. Anderson: If the Court please, the records would be the best evidence what they found in Elko.

Mr. Maxwell: The records are in evidence, your Honor.

A. We examined the Findings of Fact, which is in evidence as exhibit—I don't know what exhibit number—that shows eleven thousand dollar loan——

Mr. Anderson: If the record is in evidence, if the Court please, it is the best evidence. No use going over that again. He is testifying to what he saw.

Mr. Maxwell: He is testifying as to his examination.

The Court: I think he can summarize what he found.

A. We found a record of a eleven-thousand-dollar loan and the payments that Mr. Percifield had made on it from the time it was originated until the time I looked at the records. We found a record of other borrowed money.

Q. What other borrowed money did you find?

A. I interviewed Mr. Blake Craft and Mrs. Craft at Rapid City, South Dakota——

Q. Now, you can't testify as to what they told you. You found that they made a loan?

A. Yes, I did. I found that Mrs. Craft had made a loan of \$3,500 to her sister, Mossie Percifield. I also found that Clifford White had made a loan to Mr. Percifield of \$2,500 in [207] 1948.

Q. Did you make an investigation in respect to

(Testimony of James W. Bell.)

the non-taxable receipts of Mr. Percifield during the years 1948 and 1949?

Mr. Anderson: Let the witness answer that yes or no, please.

A. Yes.

Q. And other than the loan you have just testified to, what did you find, any other evidence of income that you can recall? A. No.

Mr. Maxwell: That will be all.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Bell, I think you have government's Exhibits 31 and 30 before you? A. That's right.

Q. Will you state again where you got those?

A. Those were supplied by Mr. Herman.

Q. In what form?

A. In a bound book form.

Q. And how many books? A. Two books.

Q. Mr. Bell, you have stated, I believe, in your previous testimony, that you had no records showing any items of gambling income.

Mr. Maxwell: I beg your pardon, the witness did not [208] so testify. I ask that the record be read.

The Court: What is the question?

Mr. Puccinelli: I asked him if he testified he was supplied with no records on which any gambling income was shown.

The Court: I don't recall him so testifying.

A. I believe I did.

(Testimony of James W. Bell.)

Q. You so stated? A. Yes.

Q. These were the records that were given to you, is that correct?

A. They are part of them, yes.

The Court: When you say "these"?

Mr. Puccinelli: That is Exhibit 33 for identification.

A. That is a part of them, yes.

Q. You read the third page of that, did you?

A. I testified that these are the only pages upon which any gambling was shown.

Q. And they were the only pages which were reproduced. I believe it was in your testimony that gambling income is shown? A. Yes, sir.

Q. Now, I believe you stated further—do I understand you correctly, Mr. Bell, to state that the only record you had showing gambling income was for October? Am I quoting you correctly?

A. I believe you are. [209]

Q. Do I, therefore, understand your testimony to be then, Mr. Bell, that these are the only daily bar receipts received?

Mr. Maxwell: Objected to as repetitious. I think that is the third time this question has been asked and answered.

The Court: It is repetitious. You may answer.

A. No, I received sheets similar to this for the period beginning in October, 1947, and ending February 25, 1948.

Q. Then I take it those are not all of those to which you testified? A. No.

(Testimony of James W. Bell.)

Q. There are others? A. Yes.

Q. I will show you what has been marked defendant's Exhibit F in evidence and ask you if you have seen that before? A. I don't recall.

Q. Will you state the date on that?

A. November 1, 1947.

Q. That encompasses the period of time for which daily records had been furnished to you?

A. Yes, sir.

Q. Is there gambling shown on that?

A. Yes, sir.

Q. Then you were mistaken, were you not?

A. Yes, sir.

Q. Mr. Bell, just so I have this straight in my own mind, you [210] got these daily bar receipts—what date was that?

A. October 17, 1947.

Q. You didn't have any from September 30, 1947?

Mr. Maxwell: Objected to as repetitious.

Mr. Puccinelli: I will withdraw the question. I guess he has answered the question.

Q. You stated then that you received employment tax returns for various dates?

A. The retained copies, yes.

Q. And you received sales tax returns for various dates?

A. That's right, the retained copies.

Q. Did you receive any other material?

A. Retained copies of the withholding tax returns, yes, we did. There is one thing I forgot—we

(Testimony of James W. Bell.)

had some miscellaneous records, that is, invoices, memoranda, I forget just in what form they were presented to us, but we did have them.

Q. Is that all? A. That's all I remember.

Q. You don't know. Are you absolutely as certain as to that as you are to any other——

Mr. Maxwell: Objected to as argumentative, your Honor. He has answered it three times.

Mr. Puccinelli: I ask that this be marked for identification.

The Clerk: Defendant's M for [211] identification.

Mr. Brown: May we examine the offer, counsel?

Mr. Puccinelli: You certainly may.

Q. I hand you what has been marked defendant's Exhibit M for identification and ask you if you can identify that?

A. That is receipt I gave Mr. Herman on February 7, 1953, when he brought the records in to us.

Q. In whose handwriting is that?

A. Mine.

Q. Completely? A. Yes, sir.

Q. Will you read that, please?

Mr. Maxwell: Objected to—that is not in evidence.

Mr. Puccinelli: I will offer it in evidence.

Mr. Maxwell: No objection.

The Court: The offer will be received in evidence as defendant's Exhibit M.

Q. Will you read that, please?

(Witness reads Exhibit M.)

(Testimony of James W. Bell.)

A. I was mistaken.

Q. Were you also mistaken as to the first statement?
A. No, sir.

Q. I ask you to read the first statement.

A. I might have been. This says 9-30-47 and the first photostat is October 17, 1947.

Q. Will you read the next one?

A. Gambling receipts, check register, October November, December, 1947; cash pay-outs, October November, December, 1947. [212] Bank records reconciliation, January through August, 1948.

Q. I will ask you if you were mistaken as to that?
A. Yes, I was.

Q. Will you read the next?

A. 4. Employment tax returns, quarter ending 6-30, 48, 9-30, 12-31, 3-31-48 and 2-4-49. No. 5 is sales tax returns, all in 1948; November, 1947; January to April, 1949; February, March and August, 1949. Daily recaps, January 1 to December 31, 1951.

Q. I ask you if you were also in error as to that?

Mr. Brown: I will object to the form of the question.

The Court: Reframe your question.

Q. I will ask you to read the last item mentioned.

A. Well, that is daily recaps for 1951. I think I was mistaken about not including that.

Q. One more item with reference to this same defendant's Exhibit M. What is the date on that receipt?
A. February 2, 1953.

(Testimony of James W. Bell.)

Q. Is that the date on which you met with Mr. Herman?

A. Yes—well—I don't think he was there more than one day; he may have been there two days. As I remember, it was February 3rd that he came there.

Q. The receipt shows February 2nd?

A. Yes.

Q. That is what you testified to?

A. Yes. [213]

Q. The receipt shows February 2nd?

A. Yes.

Mr. Puccinelli: That is all.

Mr. Maxwell: No redirect.

(Witness excused.)

MICHAEL E. THOMAS

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. Michael E. Thomas.

Q. What is your occupation?

A. Internal Revenue Agent.

Q. Where do you reside, sir?

A. Denver, Colorado.

Q. Did you have occasion to examine the cancelled checks and bank ledger sheets of the defend-

(Testimony of Michael E. Thomas.)

ant, Raymond Percifield? A. I did.

Q. Did you compare those records and make a comparison of the outstanding checks?

A. I did.

Q. Of Mr. Percifield for the years 1948 and 1949? A. I did.

Q. Do you have your work papers with you on that? A. I do.

Q. Will you refer to those, please? These cancelled checks and [214] bank ledger sheets that you had were on what bank, if you recall?

A. They were drawn on the First State Bank of Rangely.

Q. Are they what are commonly referred to as the Ace High Club checks? A. That's right.

Q. Did you see at any time the Nevada Club checks? A. No, sir.

Q. In your examination of the cancelled checks for the Ace High Club and the comparison of the bank ledger sheets, did you determine the outstanding checks on December 31, 1947? A. I did.

Q. What checks did you find to be outstanding at that time?

A. At that time I found the following checks to be outstanding: Check No. 88——

Mr. Anderson: We object to reading from the record, if your Honor please; it is not in evidence.

Mr. Maxwell: He is reciting from his work papers.

The Court: You may continue.

A. Check No. 88, amount \$19.95; check No. 100,

(Testimony of Michael E. Thomas.)

in amount \$2.50; check No. 101, in amount \$4.29; check No. 102, in amount \$5.00; check No. 105, in amount \$30.55; check No. 109, in amount \$105; check No. 112, in amount \$60.70; check No. 113, in amount \$45.50; check No. 116, in amount \$314.13; total amount of \$587.62. [215]

Q. That was on what date?

A. As on December 31, 1947.

Q. Now, did you make a similar investigation as to the date December 31, 1948? A. Yes.

Q. What did you find in that respect?

A. At that time the following checks were outstanding: No. 518, \$2.50; No. 524, \$50.00; No. 526, \$31.55; total amount of \$84.05. There was also a bank service charge, typed memorandum, in amount of \$10.00. These last two checks, No. 524 in amount of \$50 and 526 in amount of \$31.55, and typed memorandum were not deducted on the bank statement until January, 1949.

Q. So as far as the bank record is concerned, they were outstanding? A. That is right.

Q. Did you make similar determinations as to December 31, 1949? A. I did.

Q. And what did you find as to that date?

A. The following checks were outstanding: December 31, 1949, dated April 18, 1949, check No. 585, \$44; check dated June 16, 1949, No. 595, in amount of \$306; check dated December 26, 1949, no number shown, in amount of \$9.40; another check dated December 26, 1948, no number, in amount of \$134.09; check dated December 27, 1949, no number

(Testimony of Michael E. Thomas.)

shown, in amount of \$25. Check dated December 27, 1949, no number shown, in amount of \$5.00, and check dated [216] December 12, 1949, no number shown, \$172.23; total amount of \$695.72.

Mr. Maxwell: That's all.

(Jury admonished and recess taken at 3:00 o'clock.)

3:30 P.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.)

MR. THOMAS

resumes the witness stand on

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Thomas, you have testified as to the records in the First State Bank at Rangely, is that right? A. Yes, sir.

Q. And I believe you stated those were the only records that you received—I am trying to get back into place and find out where we were.

Mr. Maxwell: The witness testified he had seen the cancelled checks and bank statements on the Ace High Club at Rangely and had determined the outstanding checks from those.

Q. Did you see any other records of any other bank?

(Testimony of Michael E. Thomas.)

A. I saw the bank statements on the Nevada Bank of Commerce.

Q. Had you checks from any other bank?

A. No, sir.

Q. Did you ask any one for them?

A. No, I asked Mr. Percifield for his records the first time I interviewed him, for all of his records. [217]

Q. When was that?

A. That was in February, 1953.

Q. That is the first time you saw him?

A. Yes, sir.

Q. Specifically, Mr. Thomas, did you ask for the Nevada Bank of Commerce statements?

A. No, sir, at that time I didn't have the banks Mr. Percifield had.

Q. Mr. Thomas, are you the Michael E. Thomas named—I show you what has been marked plaintiff's Exhibit 22 in evidence, and ask you if you are the same M. P. Thomas named therein?

Mr. Maxwell: Objected to as beyond the scope of direct examination. This is not a matter which Mr. Thomas has testified to. We had another witness testify to that affidavit and I think the matter has been available to cross-examination by Mr. Puccinelli.

Mr. Puccinelli: May I make this observation—I have noted in the past where cross-examination has often drifted away from the whole scope of the direct.

The Court: That is true, that sometimes we fall

into that habit to expedite matters. This, of course, is not proper cross-examination, as the Court looks at it. This witness is confined solely to the comparison and correlation of checks.

Mr. Maxwell: Outstanding checks, yes, sir. [218]

The Court: I permit that merely to expedite the case.

Mr. Maxwell: I have no questions.

The Court: Now, as I understand the situation, gentlemen, the government is not at the moment prepared to go forward and it is understood that the defendant will take the opportunity to call certain of its witnesses out of order for the remainder of the afternoon. Is that right?

Mr. Anderson: Yes, your Honor, that is right.

The Court: Very well; let the record show that is stipulated by counsel.

CHARLES S. GLENN

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Puccinelli:

Q. Will you state your name?

A. Charles S. Glenn.

Q. Where do you live, Mr. Glenn?

A. Elko.

Q. How long have you lived there?

A. About 11 years.

Q. What is your occupation?

(Testimony of Charles S. Glenn.)

A. Wholesale beverages.

Q. For what company?

A. Peraldo Distributing Company.

Q. In what capacity do you work? [219]

A. Manager.

Q. Of the local branch?

A. Peraldo Distributing Company in Elko.

Q. You are appearing here, are you not, Mr. Glenn, under subpoena to testify on behalf of the defendant? A. I am appearing on subpoena.

Q. As part of that subpoena, you were asked to bring certain records, is that right?

A. That is correct.

Q. Do you have those records with you?

A. I do.

Q. May I see them? I ask that this be marked defendant's next in order.

The Clerk: Defendant's N.

Mr. Maxwell: May I ask the witness on voir dire?

Q. (By Mr. Maxwell): Does this document, marked defendant's N for identification, consist of all of your records with respect to the account of the Nevada Club at Wendover, Nevada, for the years 1948 and 1949?

A. That represents all the transactions.

Q. It also has information as to transactions in prior years, does it not?

A. Yes, that is the complete record of transactions.

Q. And the first entry I see here is October 11,

(Testimony of Charles S. Glenn.)

1949? A. That is right. [220]

Q. And there is a balance shown in the account of how much? A. \$1,133.04.

Q. Was that still owing at the end of the year 1949? A. That is correct.

Q. What is the business of your company, sir?

A. What is the business?

Q. Yes.

A. Wholesale distributors of beer, wines, liquor and soft drinks.

Mr. Maxwell: We have no objection. I thought you had offered it, counsel.

Mr. Puccinelli: No.

Mr. Maxwell: Do you intend to offer it?

Mr. Puccinelli: Oh, yes. I offer this in evidence, if your Honor please.

The Court: The offer will be received in evidence as defendant's Exhibit N.

Q. (By Mr. Puccinelli): Now, I will ask you to state, Mr. Glenn, what it is.

A. Well, it is a ledger card, showing all the transactions of the business of the Peraldo Distributing Company with the Nevada Club during the years indicated on the card.

Q. Nevada Club, where?

A. At Wendover, Nevada.

Q. I will ask you, Mr. Glenn, will you give me the account [221] balance as of the last day in December, 1947, account balance as of the last day in December, 1948, and account balance as of December, 1949, or the last entry of 1949.

(Testimony of Charles S. Glenn.)

A. The balance December, 1947, was \$322.94; December, 1948, \$1,654.79, and there is no December date in 1949. October——

Q. Just read the last date.

A. The last entry I have was \$1,133.04.

Q. As of what date?

A. October 11, 1949.

Mr. Puccinelli: That is all.

Cross-Examination

By Mr. Maxwell:

Q. Do you know the defendant, Raymond Percifield? A. Yes, I do.

Q. Do you deal with him in furnishing liquor, wine and other bar supplies?

A. That is correct.

Q. Do you deal with any one else?

A. You mean at that time?

Q. Yes.

A. Yes, when Mr. Percifield wasn't there, whoever was in charge I dealt with, whoever was in charge.

Q. Now, did you receive payments on that account from time to time, as shown on this ledger sheet? A. Yes, as indicated.

Q. Were those payments by check or by cash?

A. Well, I would just have to say both. I couldn't recall. [222]

Q. Do you recall on occasion receiving cash?

(Testimony of Charles S. Glenn.)

A. That is pretty difficult to answer. I would say I did, yes. Cash and checks.

Q. Do you recall on occasion receiving checks?

A. I received checks mostly from Mr. Percifield when he was there. When he wasn't there, when I asked for the manager, I received cash.

Q. Do you have any records which would reflect the nature of those payments?

A. I am afraid I don't. They are a little too old.

Q. You have destroyed all your records for 1948 and 1949?

A. I think I have. I don't intend to keep them over five years.

Q. How does it come you saved those?

A. Those ledger cards there we keep.

Q. You retain all your ledger cards?

A. Well, I might put it this way—this bill has never been paid. It is in the ledger cards account unpaid bills.

Mr. Maxwell: That is all.

Mr. Puccinelli: That is all.

(Witness excused.) [223]

WILLIAM W. SMITH

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. Mr. Smith, you have heretofore been sworn with other witnesses in this case? A. I have.

(Testimony of William W. Smith.)

Q. How long, Mr. Smith, have you known Mr. Percifield?

A. I wouldn't say for sure, but I would say for twenty years, or a little more. I knew of him longer than that, but I knew him personally that long.

Q. What business was he in at that time?

A. In the contracting business.

Q. Did he have any equipment at that time?

A. Yes, I couldn't tell you what, but I know that he delivered groceries around town, some kind of a panel job, and he also had a truck.

Q. Do you know up to what date he continued in the trucking business?

A. No, I wouldn't know.

Q. Approximately what year?

A. No, you would have to ask him that. I wouldn't venture a guess on when it was. It was several years he had it.

Q. Where did he live then?

A. About a block of where I lived.

Q. How long did he live there, about?

A. Well, I can't tell you. [224]

Q. A year or two or three?

A. I would say longer than that.

Q. From about when to about when?

A. Well, that would take a little figuring. I would say it was anywhere from '36 or '37 on to—I can't tell you.

Q. Are you acquainted with his general reputation in that community at that time?

(Testimony of William W. Smith.)

A. Oh, I think so. I never knew anything bad of him.

Q. And I assume then your answer would be his reputation was good if you didn't know anything bad about him.

A. That is right, so far as I know.

Mr. Anderson: That's all.

Cross-Examination

By Mr. Brown:

Q. Mr. Smith, did you know Mr. Percifield in 1948 and 1949? A. Yes, sir.

Q. You lived in the same town with him?

A. No, I don't believe so. I don't believe he was there at that time.

Q. Do you have any recollection of his reputation in 1948 and 1949?

A. No, I can't swear I saw him in those years. I probably did; he could have been there.

Mr. Brown: I think, your Honor, in view of the statement of Mr. Smith, that he had no knowledge of the reputation, or that he had a reputation in 1948 and 1949, we will have to move that his testimony be stricken.

Mr. Anderson: We submit, if the Court please, it might [225] affect the weight, but not the admissibility.

Mr. Brown: Well, now, he testified they lived in the same town, a few block away from each other, and Mr. Percifield was in the trucking business, in what year I don't recall; I don't think he said.

(Testimony of William W. Smith.)

Mr. Anderson: He said starting in the thirties and didn't say what year it was.

A. I wouldn't venture to say what year. I can't remember. It was some time in that time, because I moved into Gillette in 1935 and he was there at that time.

Mr. Brown: I think, your Honor, it is too remote.

The Court: I realize it is very remote. I am going to permit it. Motion denied.

Mr. Anderson: There is one question I would like to ask.

Mr. Brown: May I finish my cross-examination?

Mr. Anderson: Oh, yes, I thought you had finished.

Q. Now, in connection with your opinion as to his reputation, have you heard that he gambled or ran gambling games at the Ace High Club in Rangely, Colorado?

Mr. Anderson: May our objection heretofore made to this also go to this evidence, too?

The Court: The record will note the objection made to this line of questions.

A. No, I knew nothing about his [226] operations.

Q. You never heard about it—you didn't know him in 1948 and 1949?

A. If I knew him in 1935, I knew him in 1948.

Q. You didn't know his activities at that time?

A. No, I wasn't personally acquainted with that.

Q. What is the last time you saw him?

(Testimony of William W. Smith.)

A. Well, I don't know. His mother was in the hospital and I went up to the hospital and notarized some papers because his mother wasn't able to come to the office.

Q. Calling your attention to 1948 and 1949, how long was it prior to the year 1948 that you had seen him? A. Well, I wouldn't say.

Q. Well, was it one year or two years or five years or ten years?

A. No; I wouldn't answer that question because I perhaps saw him every year; I could have saw him every year, but I wouldn't swear. I saw him on occasions.

Q. You lived in the same community. How many years since you lived in the same community prior to 1948?

A. Well, I wouldn't say that either. I don't know what year he left there. He must have left there around the early part of the forties, but I am not sure about that.

Q. Just what do you base your testimony upon, as to his reputation?

A. Well, I saw him almost every day when he was in the trucking business. He hauled for concerns around there and made [227] deliveries and also for the express company.

Q. This was in what year?

A. Some time after '35 that I was in town.

Q. Before what year, to the best of your recollection?

(Testimony of William W. Smith.)

A. I wouldn't attempt to say. There were several years there, but I wouldn't say how many.

Q. Are you sure he had a general reputation during those years?

A. Well, a little town like that, he would have or I would have known different.

Q. He just had a general reputation—would you characterize it?

A. I never heard anything bad about him.

Q. Did you ever hear anything good about him?

A. Well, a lot of people you don't hear anything good about.

Q. Just answer my question, to the best of your recollection.

A. Well, I wouldn't say one way or the other.

Mr. Brown: I think that is all.

Redirect Examination

By Mr. Anderson:

Q. Mr. Smith, did Mr. Percifield own the house there when he lived half a block from you?

A. I think he owned that house; I am quite sure he did.

Q. Do you know about what the value of the house was?

Mr. Brown: Objected to—that exceeds——

A. No, I wouldn't——

The Court: Objection sustained.

Mr. Anderson: That is all.

(Witness excused.) [228]

WILLIAM H. ELAM

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. Please state your name for the record.

A. William H. Elam.

Q. Where do you live, Mr. Elam?

A. Rangely, Colorado.

Q. How long have you lived in Rangely?

A. I have been in Rangely since 1948.

Q. What official position, if any, do you hold?

A. I am mayor of the town of Rangely.

Q. How long have you been mayor?

A. It will be two years in April.

Q. Do you know Raymond Percifield?

A. I do.

Q. How long have you known him?

A. I have known Mr. Percifield personally since about 1950.

Q. Are you acquainted with his general reputation in the community where he lives, there in Rangely?

A. Yes, I am.

Mr. Brown: I will have to object on the ground no proper foundation has been laid. I submit it must be established first if he has a general reputation in the community.

The Court: Well, I think it is just a question of which comes first. The objection will be [229] overruled.

(Testimony of William H. Elam.)

Q. Is his general reputation good or bad?

A. Very good.

Mr. Anderson: That's all.

Cross-Examination

By Mr. Brown:

Q. Mr. Elam, you said you are mayor of Rangely, is that correct? A. That is correct.

Q. And that you have been mayor for approximately two years, is that correct?

A. That is right.

Q. And you have been there since 1948 and know Raymond Percifield since that time?

A. Personally since that time. I knew him prior to that also.

Q. You have also testified that his general reputation is good, is that correct? A. Yes, sir.

Q. Now, I ask you if gambling is allowed in Rangely?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial, beyond the scope of direct examination.

The Court: Objection overruled.

A. Will you repeat the question, please?

Q. I asked you if gambling is allowed in Rangely?

Mr. Anderson: We submit it is irrelevant and immaterial on the matter involved here.

The Court: Objection is sustained.

Q. In 1948 was gambling allowed in [230] Rangely?

(Testimony of William H. Elam.)

A. Yes, it was, to the best of my knowledge.

Q. Were you there in 1948? A. I was.

Q. Did you ever observe gambling there at that time, '48? A. When?

Q. And during 1949? A. Yes, sir.

Q. Did you ever observe Mr. Percifield engage in gambling activities in Rangely during 1948 or 1949?

A. Yes, I knew there was gambling at the Ace High; all of the places.

Q. And that did not affect his reputation in Rangely?

Mr. Anderson: We object to that as argumentative.

Mr. Brown: I withdraw the question.

Q. Does that have any bearing on your answer as to whether his reputation is good?

A. It does not. At that time there was gambling at all the clubs in Rangely. They were donating to the town and as far as I am concerned, it does not bear on his reputation.

Q. You say they were donating to the town?

A. That is what I understand.

Q. But you don't know? A. I don't know.

Q. It was generally done in Rangely at that time, gambling was? A. Yes, sir. [231]

Q. Even though it was illegal? A. Yes, sir.

Mr. Brown: I think that is all.

Mr. Anderson: That is all.

(Witness excused.)

HUGH L. CALDWELL

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. State your name to the Court and jury, please. A. Hugh L. Caldwell.

Q. Where do you live, Mr. Caldwell?

A. I live on a ranch about half way between Meeker and Rangely.

Q. Do you hold any official position in Rio Blanco County, Colorado? A. I do.

Q. What is that position?

A. County commissioner.

Q. How long have you been county commissioner? A. About 17 years.

Q. Are you such now? A. Yes.

Q. Do you have reason to go to Rangely often?

A. Yes.

Q. Is Rangely in your district of the county, as county commissioner? A. Yes. [232]

Q. Do you know the defendant, Raymond Perci-field? A. Yes, I do.

Q. How long have you known him?

A. Well, I think it has been eight or nine years.

Q. Are you acquainted with his general reputation in Rangely where he lives? A. Yes.

Q. Is that reputation good or bad?

A. Good.

Q. I will ask you, Mr. Caldwell, what kind of

(Testimony of Hugh L. Caldwell.)

a place is Rangely, as to whether it is a boom town or——

Mr. Maxwell: I object as calling for conclusion of the witness.

The Court: I think by virtue of his general knowledge and position in the community, he can testify.

A. Really, there wasn't any town until after '50; approximately ten families.

Q. You say 1950? A. Or '40, pardon me.

Q. And after that what happened?

A. Well, that is when the oil companies came in to produce the oil field; Rangely is on the edge of the field.

Mr. Brown: We object to that as irrelevant and immaterial; has no bearing upon any issue in this case.

Mr. Anderson: We submit it does have a bearing on the issues in this case. [233]

The Court: What is the purpose, counsel?

Mr. Anderson: To show that after Mr. Percifield purchased the Ace High Club the boom was off and business dropped off.

The Court: We are getting pretty technical with that expression "boom" and I think we can circumvent that part of the testimony. If you want to show the change that took place or amount of falling business, I think that is pertinent.

Mr. Anderson: Very well, I will try to do it that way.

Q. After the development of the oil field came

(Testimony of Hugh L. Caldwell.)

in and the town filled up, was the population increased? A. Yes.

Q. Do you know to what extent, Mr. Caldwell, in area of the oil field there?

Mr. Brown: Would you request counsel to place the date and time, please, your Honor?

The Court: Yes, I think you should direct the witness' attention to a definite period, counsel.

Mr. Anderson: He testified it was after 1940.

Q. When did the development of those fields begin, about when? A. About '44 and '45.

Q. And at that time do you know about to what extent the population in that community [234] increased?

A. I would say approximately five thousand people lived there at the peak.

Q. And about how long did this development work of the oil field continue?

A. I think '47 was the last year; '48, possibly it went up a little.

Q. And after, what was the population around?

A. Probably two thousand in the area.

Q. At what time, Mr. Caldwell, about?

A. Well, it is hard to give definite dates, but it happened all at once, possibly two years—'49 would be the smallest population there was.

Q. How about '48, the population?

A. Possibly not quite as low as '49, but down, way down.

Q. I show you what has been marked as de-

(Testimony of Hugh L. Caldwell.)

fendant's Exhibit O and I will ask you to examine that and see if you know what it is?

A. It is a treasury receipt of taxes paid.

Q. What county? A. Rio Blanco.

Q. Do you know the treasurer's signature?

A. I do.

Mr. Anderson: We offer this Exhibit O in evidence.

Mr. Maxwell: Your Honor, I object. The document is not sufficiently identified, especially as to date.

The Court: I do not think there is a proper foundation there. [235]

Mr. Anderson: We believe the exhibit itself shows the dates it covers. He says he knows what it is and knows the treasurer's signature.

The Court: Does the defendant know?

Mr. Anderson: Oh, yes, he would know.

The Court: The Court will permit it to be entered. Objection overruled.

Mr. Maxwell: Well, if the Court please, it is intended to show a payment, I believe, in 1950, which is completely immaterial. Paying taxes for 1948, that he owed at the end of 1948 and paid in 1949.

Mr. Brown: We submit that could have been certified to, could have been presented to us.

Mr. Anderson: It is the original.

Mr. Maxwell: Furthermore, may it please the Court, this return showed Mr. Percifield was a cash basis taxpayer and what taxes he owed at the end

(Testimony of Hugh L. Caldwell.)

of '49 is completely immaterial to this case. What taxes he paid during 1948 and 1949, they might be material.

Mr. Anderson: I thought we were proceeding on the net worth basis on obligations and payments and that is an obligation he owed at that time, and would be properly deductible.

Mr. Brown: If he states it is the original document, your Honor, how did it get here? It is strictly hearsay.

The Court: There is, as far as the Court observes, no official stamp on this, so it could be a fugitive paper. [236]

Mr. Anderson: I would like to ask one more question.

Q. Mr. Caldwell, do you know whether or not this is an original tax receipt?

A. It certainly looks like it is.

Mr. Brown: May I inquire on voir dire?

The Court: You may?

Q. (By Mr. Brown): Do you, in Rio Blanco County, Colorado, hold the position as treasurer or as deputy treasurer? A. No.

Q. Are you familiar with the functions of those offices? A. Well, reasonably well.

Q. On what do you base your statement, "reasonably well"?

A. Well, I haven't worked in any of the offices, but we do have to co-operate with the other offices.

Q. You are not familiar with the functions of

(Testimony of Hugh L. Caldwell.)

that office in any capacity as acting as treasurer, other than as commissioner, is that correct?

A. That is right.

The Court: You have nothing to do with the mechanics of taxes, have you, other than, I assume, you set rates, as we do here?

A. Yes

The Court: You had nothing to do with the collections?

A. Not ordinarily.

The Court: What do you mean, not ordinarily?

A. Well, unless something goes to the [237] taxpayer.

The Court: I am speaking of collections; and you are not custodian of any of the documents, such as we have here?

Mr. Anderson: To save time, we will put this in by another witness later. Very well, the offer has been withdrawn.

That's all.

Mr. Brown: We have no cross-examination.

(Witness excused.)

ROBERT FULTON

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. Will you state your name?

A. Robert T. Fulton.

Q. Where do you live, Mr. Fulton?

A. Meeker, Colorado.

Q. How long have you lived there?

A. Thirty-nine years.

Q. Do you hold any official position in the county in which Meeker is located? A. I do.

Q. What county do you hold this position in?

A. Rio Blanco County.

Q. And what position do you hold?

A. Sheriff of Rio Blanco County.

Q. For how long have you been sheriff of Rio Blanco County? A. Eight years. [238]

Q. Over what period?

A. January 14, 1947 to January 13, 1955.

Q. Are you acquainted with the defendant, Raymond Percifield? A. I am.

Q. How often, in your official capacity, have you visited his club?

A. Oh, at least once a week; quite often.

Q. Are you acquainted with the general reputation of Mr. Percifield in Rangely, Colorado?

A. I am.

Q. Is that reputation good or bad?

(Testimony of Robert Fulton.)

A. It is good.

Q. Were you in Rio Blanco County before the development of the Rangely oil field?

A. I was.

Q. About when did that development commence?

A. It started in about 1945.

Q. About how long did the development go, up to what year?

A. The big boom wasn't until the middle of '48. The drilling program was over; the boom started to take off.

Q. Was this depreciation a sudden process or gradual?

A. It was quite sudden. Actually the drilling was over, the rigs were moved.

Q. And employees, what did they do?

A. They left with the rigs.

Mr. Anderson: Cross-examine. [239]

Cross-Examination

By Mr. Brown:

Q. Mr. Fulton, as sheriff of Rio Blanco County, you knew Mr. Percifield? A. I did.

Q. Did you know him during 1948 and 1949?

A. I did.

Q. And you went to Rangely approximately once a week, is that correct?

A. At that time I went probably four or five times a week.

Q. Did you have a deputy down there at all times? A. Had one deputy, yes, sir.

Q. Are you familiar with the Ace High Club

(Testimony of Robert Fulton.)

in Rangely? A. I am.

Q. What was it? A. A bar and cafe.

Q. Was it a gambling establishment?

A. To my knowledge, I never saw any gambling.
I heard rumors, never saw any.

Q. Just rumors?

A. Heard rumors of gambling all over at that
time.

Q. That is when you were sheriff?

A. Yes.

Q. And you were in there four or five times a
week?

A. I wouldn't say I was in the Ace High.

Q. In Rangely? A. Yes. [240]

Q. Did you ever investigate those rumors?

A. No.

Q. You never arrested Raymond Percifield for
gambling? A. No.

Q. How often did you go in his club?

A. About once a week.

Q. And you saw no gambling in there?

A. No.

Q. You arrested others, but you didn't arrest
Mr. Percifield?

Mr. Anderson: We object to that, if the Court
please, as repetitious. That is what he said.

Mr. Brown: That is all.

Mr. Anderson: That is all we have at this time,
your Honor.

(Jury admonished and recess taken at
4:00 p.m.)

February 17, 1956—11:00 A.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.)

The Court: You may proceed.

FORREST P. CALKINS

a witness on behalf of the government, duly sworn,
testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. Forrest P. Calkins.

Q. Have you been previously sworn? [241]

A. Yes, sir, I have.

Q. Where do you reside, Mr. Calkins?

A. Los Angeles, California.

Q. What is your occupation?

A. Technical adviser to the Regional Counsel
for the San Francisco region.

Q. At Los Angeles?

A. At Los Angeles, yes, sir.

Q. How long have you been so employed?

A. On permanent assignments since October of
1955. Temporary detail since January, 1953.

Q. Where were you employed prior to your occupation as technical adviser to the chief counsel's office?

A. Internal Revenue Agent's office in Los Angeles. I was employed as Internal Revenue Agent.

(Testimony of Forrest P. Calkins.)

Q. When were you so employed?

A. November 15, 1949.

Q. Have you had any accounting education, sir?

A. Yes, sir; I have had six years.

Q. At the University?

A. Yes, sir; Pasadena two years; U. C. L. A. two years and two years at Southwestern.

Q. Have you ever testified as an expert witness at any income tax trials?

A. Yes, sir, I have.

Q. On criminal or civil? [242]

A. Criminal and civil.

Q. Before what courts?

A. The district court of the Southern District of California and tax courts of the United States.

Q. And were you qualified as an expert in those trials? A. Yes, sir, I was.

Q. Mr. Calkins, have you been in attendance at this trial throughout the testimony?

A. Yes, sir.

Q. Have you examined the documents placed in evidence? A. Yes, sir, I have.

Q. And listened to all of the testimony?

A. Yes, sir.

Q. Have you examined the records placed in evidence here, the records of the defendant placed in evidence here? A. Yes, sir, I have.

Q. Can you tell me what basis those records are kept on, in accounting terms?

A. On the cash basis.

(Testimony of Forrest P. Calkins.)

The Court: Counsel, you are referring to the defendant's records?

Mr. Maxwell: The defendant's records, yes, your Honor.

Q. Now, more specifically, I am referring to Exhibit 31 and Exhibit No. 30. Those records, you say, are kept upon the cash basis? [243]

A. Yes, sir. I notice, in going through them, certain items charged to the accounts payable. Accounts payable would indicate an accrual basis, but from the record we have, there apparently was no way of actually maintaining accounts payable.

Q. I wonder if you would explain that, what those accounts payable have to do, whether the basis is cash or accrual? A. Well—

Q. Let us start this way—let us explain what the difference is between cash basis and accrual basis.

A. In the simplest form, in the cash basis, the money becomes taxable when it is paid or received, is a taxable item at the time of payment and is a deduction for income tax purposes, whereas, on the accrual basis, the income is taxable to the individual or taxpayer at the time it is earned rather than received and the expense is a liability as a deduction at the time the liability is incurred, rather than when the liability is paid.

Q. So that if you owed a bill, for example, at the end of a time and had not yet paid it, if you were on the accrual basis, if you had not paid the bill, but you owed it, if you are on the accrual basis, it

(Testimony of Forrest P. Calkins.)

has become an expense then deducted, but if you are on the cash basis, it is not yet deducted until you pay it? A. That is right.

Q. Have you examined the income tax returns for the years 1948 and 1949 in evidence here?

A. Yes, sir, I have. [244]

Q. Those are Exhibits 1, 2 and 3, is that correct? A. Yes, sir, that is correct.

Q. Now, can you tell whether those returns were made on the cash or accrual basis?

A. With the exception of inventory items, they were made on the cash basis.

Q. Will you explain your answer with reference to inventory items?

A. Well, inventory items, stock in trade is the major income producing factor and at the time you have inventory at the beginning period, you add to this purchases during that period; at the end of the period you still have a certain inventory on hand, then you subtract from that. In other words, that item was not sold, you still have that on hand.

Q. And when you subtract what you have on hand from purchases during the year, plus the inventory at the beginning of the year, what figure do you reach? A. Cost of goods sold.

Q. What relation does that have to accrual and cash basis?

A. It is in effect future inventory as an accrual item.

Q. Then in view of the fact that inventories are set out in the 1948 return, I believe you said——

(Testimony of Forrest P. Calkins.)

A. Yes, sir.

Q. ———does that have any effect as to whether the income tax returns for that year were on a cash or accrual basis?

A. I believe it would be what we generally refer to as a hybrid [245] system; that is, all items, with the exception of inventory, are treated on a cash basis. Inventories are treated on accrual basis.

Q. From what books and records you have seen in evidence here, can you tell me whether or not those books and records would be adequate to properly reflect income, provided they were complete in all respects?

A. Well, yes, sir, I believe they would.

Q. Would the commissioner of Internal Revenue have the right to change the accounting basis of the taxpayer in this instance, assuming that the books were clear and reflect income?

A. Referring to these books?

Q. Yes, sir.

A. No, I don't believe he would.

Q. In other words, the Commissioner of Internal Revenue, when computing Mr. Percifield's income, would be required to use the same hybrid system for the year 1948? A. Yes, sir.

Q. Now, what is the situation as to the year 1949? I refer you to the income tax return.

A. The year 1949 profit and loss statement, attached to the income tax return itself, as such, would have a net figure I mentioned before, cost of goods sold. I cannot tell whether that was pur-

(Testimony of Forrest P. Calkins.)

chases or whether inventory plus purchases, less ending [246] inventory, resulting in cost of goods sold.

Q. Do the books tell you whether or not, Exhibits 30 or 31, an inventory was taken?

A. No, sir, they do not.

Q. Would it be possible for gambling income to be on other than a cash basis? In other words, could that be on an accrual basis?

A. No, I should say that should be on cash basis.

Q. Now, you say that you have examined all of the records in evidence here? A. Yes, sir.

Q. And you have heard all of the testimony of the witnesses thus far? A. Yes, sir, so far.

Q. And have you then prepared, from the records in evidence and the testimony of witnesses, a computation of income?

A. I have prepared two computations.

Q. What computations of income are those?

A. One computation was computation of net income on deposit and expenditure; the other being on the net worth method.

Q. On bank deposit and expenditure method, I believe you stated, or did you say deposit and expenditure method?

A. Deposit and expenditure.

Q. Will you tell us briefly what the deposit and expenditure method is in connection with computation of income, if any, during the year?

A. It is a reconstruction of the taxpayer's financial transactions, [247] either running through his

(Testimony of Forrest P. Calkins.)

bank account or cash money that is expended during the year. We first take the total bank deposits. We subtract from them any deposits that were not of an income nature; that is, loans made from private parties, and deposited in the bank account and that is placed in non-taxable income. We add to that known cash expenditures that would not be reflected properly in the bank deposits. That would give us the gross income. From that we would subtract deductible expenses made during the period of the year, such as analysis of deposits account or cancelled checks, depreciation, his business expenses, personal expenses, although we would keep the business and personal expenditures separate. We would take the cash outlay expenses, or the checks written and paid and to that we would add what we refer to as known cash item expense, such as depreciation. We would have adjusted gross income, which in simplest form is the taxpayer's evidence of income. From that we would deduct the withdrawals of a more personal nature, as personal deduction, trips and payments on personal obligations, taxes paid, auto licenses, and taxable items of that nature, medical expenses as a personal deduction, to arrive at net income, or if those personal deductions do not total what the government allows as standard deductions, which is there computed on the tax table on the back of the tax returns for adjusted gross income of five thousand dollars or less was 10 per cent of your net income or adjusted gross income, limited to one thousand

(Testimony of Forrest P. Calkins.)

dollars, taking either the standard deductions [248] or items deduction, whichever is higher, we arrive at the net income for tax purposes.

Q. Now, if I understand you correctly, actually what you start in making computation of income by deposit and expenditure method, are the deposits to the bank account, is that correct?

A. Yes, sir, that is correct.

Q. And by adding all expenditures, or non-taxable receipts for expenditures, you arrive at a total of what would approximate that income. There are a few steps in between. Now you said you made a computation on another basis?

A. Net worth basis.

Q. I wonder if you could tell us what a net worth basis is, briefly?

A. Net worth basis is the reconstruction of income shown through an acquisition of assets over a given period of time for the taxable year. That is done by establishing a man's net worth; that is, assets he owns and the liabilities he owes on those assets. For example, you had a car and paid three thousand dollars and paid one thousand dollars, you have an equity of one thousand dollars. The net worth would show an automobile as an asset, carried at three thousand dollars, less the liability on the automobile of two thousand dollars; your net worth would be one thousand dollars. Say that is at the beginning of the period. If you acquire any other assets during the period, assuming the same automobile during the year you paid the two thousand

(Testimony of Forrest P. Calkins.)

dollars, the net worth computation of the assets at the end of [249] of the year would still list that automobile at three thousand dollars, would list no liability, would show his net worth at three thousand dollars, or increase of net worth of two thousand dollars. To that we would add net expenditures, personal expenditures, which were not reflected in that balance itself. In other words, a person, during the year, acquires a certain amount of money. The money usually goes one of two places, either spent or lost, paid for meals and utilities, or it goes to acquire assets. Now the money that is not reflected in the balance sheet, in arriving at net worth, which has increase in the balance sheet itself, in comparison with beginning, the ending balance sheet or ending picture, we add to that items which would not be reflected in that, which are usually personal expenses, living expenses, which would give us the same result for adjusted gross income figure. From that we would get the standard deductions or itemized deductions as liability.

Q. And you arrive at the net income?

A. Yes, sir.

Q. Mr. Calkins, the typewritten documents have just arrived in the courtroom. I wonder if you could explain what they are?

A. These are the computations I have just been discussing.

Q. Can you identify this typed document in a little bit better from than computations we have been discussing?

A. The typed page is my computation of net

(Testimony of Forrest P. Calkins.)

income based on bank deposits and expenditure method, covering the years 1948 and 1949. [250]

Q. What is the second page?

A. The second page is computation of net income based on net worth method, covering the years 1948 and 1949, showing balance sheets as of 1948, December 31, 1948, and December 31, 1949.

Q. And the balance of the pages?

A. They are supporting schedules that I have prepared.

Q. In other words, they are schedules explaining the items on your two front pages?

A. Yes, sir.

Q. Are those computations based on evidence in the records and the testimony of the witnesses?

A. Yes, sir, entirely.

Mr. Maxwell: I will offer the computations in evidence at this time.

The Court: There being no objection to the offer, it will be received in evidence as government's No. 34.

Mr. Maxwell: May it please the Court, counsel for the plaintiff and counsel for the defendant have agreed to stipulate that copies of this exhibit, which is numbered 34, may be passed to the Court and counsel and the jury, in order to follow the explanations to be given in the testimony of Mr. Calkins, and also the same stipulation will be entered into by the government at the time the defendant put on a witness for the same purpose, if he does. [251]

Mr. Puccinelli: That is so stipulated.

(Testimony of Forrest P. Calkins.)

The Court: Let the record show that it is stipulated that copies of the computations designated Government's Exhibit 34, may be delivered to members of the jury, for the purpose of following the testimony of the witness.

Mr. Maxwell: I think the copies should be returned at the close of the witness' testimony.

Mr. Puccinelli: I think that was the further stipulation.

The Court: The record will show the stipulation and understanding of counsel and the Court, that at the conclusion of the testimony the copies of computations handed to the jury for their assistance will be returned.

Mr. Maxwell: May I hand copies to the jury, your Honor?

The Court: Yes, you may.

Q. Mr. Calkins, referring to the first page of Exhibit 34 in evidence, and the second page, can you tell me whether these computations are made on the cash or accrual basis?

A. On the cash basis, with the exception of inventory item.

Q. Are they made on the same basis as the income tax returns, which I believe are still before you?

A. Yes, sir.

Q. They are made on the same basis as those returns? [252]

A. Yes, sir.

Q. Now I wonder if you would explain page No. 1 of this exhibit. You have the original exhibit now, do you?

A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. Would you explain what you did in making those computations?

A. In making this computation, I first added all of the cash deposits, plus cash which was found listed on deposit tickets as such cash item; that is, you would often find occasion where a person needs cash, they will deposit checks for so much money, less so much cash, and then deposit to the bank and that is considered as deposit. The cash that is accounted for here in line 1(b), cash not deposited actually stated, is less than those deposit tickets on the First State Bank of Rangely, showing he entered total amount on the deposit ticket, the cash taken out was less the cash item referred to on the deposit ticket and in the amount of actual deposit never did.

Q. May I understand that. If every one will turn to page 3 of this computation, and would you make your explanation with respect to the first item there on that page?

A. Yes, sir. On January 2, 1948, the deposit ticket reflected total deposits, total amount to be deposited, \$1,283.57. Less cash item of \$283.57, leaving net deposit, actually deposited in the bank account, credited to the taxpayer's ledger, was one thousand dollars.

Q. I show you typed deposit slip on Exhibit 7 in evidence, and ask you if that is the deposit slip to which you are referring? [253]

A. Yes, sir, it is. I might add on these deposit

(Testimony of Forrest P. Calkins.)

slips it does not actually show less cash. It shows the initials "LC."

Q. Does that deposit show down at the bottom of the ticket? A. Yes, sir.

Mr. Maxwell: I ask permission of the Court to exhibit this deposit ticket before the jury.

The Court: You may.

Q. Now you have totalled on page 3 of this exhibit what amounts?

A. I have totalled the total amount on the deposit ticket, the cash withdrawn, or cash taken by him and the net deposits. Among these particular checks or these particular deposit tickets, this does not include all the deposits for the years 1948 or 1949. This is merely a summary of those deposit tickets on which there is a record of cash going back to the taxpayer and was not left at the bank on deposit.

Q. You have done the same thing for the year 1949? A. Yes, sir, I have.

Q. As to the First State Bank of Rangely?

A. Yes, sir.

Q. That was the Ace High account only?

A. Yes, sir.

Q. Did you do the same thing on the Nevada account? A. Yes, sir, I did.

Q. Were there any such items reflected in the deposit slips?

A. In the year 1948 I found none. In the year 1949, as I recall, [254] there were possibly one or two small items. Those, I might explain, would

(Testimony of Forrest P. Calkins.)

make no net difference. In other words, we are merely at this time trying to account for all of the monies received. If you will look on line 5(f), I have also deducted the same amount that was added in on line (b).

Q. Why did you do that?

A. We had no way of tracing this cash. We did not know for what purpose it was used, whether for personal or business expenditure. I recall nothing in the evidence, in the form of testimony or documents, that indicated it was used for personal expenditure or business, so it was all treated as a business expense.

Q. You allowed it as a business expense?

A. Yes, sir, I did.

Q. Now will you explain from what you took your figures on line 1(a) on the first page?

A. Line 1(a) I totalled both the bank deposit slips and deposits as per the ledger sheet for the years 1948 and 1949. I might say there is one deposit slip missing.

Q. Those are Exhibits 15, 9, 8 and 7 in evidence?

A. Yes, sir, they are.

Q. Now would you explain 1(c)?

A. 1(c) is total of all deposits made to the Nevada Bank of Commerce in the years 1948 and 1949. I totalled both the deposit tickets and the deposits as reflected on the ledger sheets [255] themselves.

Q. And then you arrived at what total?

A. \$128,444.28 for the year 1948; \$21,816.54 for the year 1949.

(Testimony of Forrest P. Calkins.)

Q. Now that represents what concept? I mean, what would you call that total?

A. That total is all the cash or monies received as reflected on the bank records.

Q. Now were there any expenditures not reflected on the bank records?

A. Yes, sir, I found certain cash expenditures which were not reflected on the bank records.

Q. That you have included in?

A. Line 2 also——

Q. Line 2 shows what figures?

A. A total for each year, \$8,250 for 1948; \$7,-299.55 for 1949.

Q. What have you done with those amounts?

A. I have added those to the cash that is reflected through the records of the bank accounts.

Q. And then what total did you arrive at?

A. \$136,694.28 for the year 1948; \$29,116.09 for the year 1949.

Q. What sort of total would that figure; what does the concept of those totals represent?

A. That would represent all the monies known he has received or handled by the taxpayer during the years 1948 and 1949.

Q. As shown by the testimony or exhibits?

A. Yes, sir. [256]

Q. Now let us go back to line 2, cash expenditures on net income record, schedules I and J. Perhaps you can tell us how you reach those figures. Start with Schedule I.

(Testimony of Forrest P. Calkins.)

A. Schedule I is a list of cash expenditures for the year 1948, which I could not trace back through the bank accounts of the taxpayer or through his personal records.

Q. In other words, you did not find them listed in the bank register?

A. No, sir, I did not.

Q. Or in the records themselves?

A. No, sir.

Q. Of what do those items consist?

A. Payments on notes; two payments on the Joe Rosa note, August 24, 1948, for \$2,250, payment on the Joe Rosa note on December 23, 1948, in the amount of \$1,500. Payment on loan from Bacon on August 30, 1948, in amount of one thousand dollars, followed by a listing of four payments to the City of Rangely, donation items, one on August 12, 1948, in amount of \$200, one October 25, 1948, in amount of \$100; on November 23, 1948, in amount of \$100; on December 28, 1948, in amount of \$100. I added the living expenses, estimated at three thousand dollars, giving the total cash expenditure unaccounted for on any records of the taxpayer in the amount of \$8,250 for the year 1948.

Q. Can you tell us where you arrived at your information as to payments on the Joe Rosa [257] note?

A. From the loan record.

Q. That is here?

A. Yes, sir.

Q. How about the payment on the loan from Mr. Bacon?

A. From the Conclusions of Law and Findings of Fact.

(Testimony of Forrest P. Calkins.)

Q. That is here in evidence also?

A. Yes, sir.

Q. How about the information as to the City of Rangely?

A. The City of Rangely I received the dates and amounts from the schedule left by the witness from the City of Rangely.

Q. And the living expenses, where did you get them?

A. From Special Agent Bell's testimony. He testified that Mr. Percifield estimated living expenses at three thousand dollars per year.

Q. Now let us turn to these assets on this computation, and I will ask you to explain the items that you have in line 3.

A. In line 3 I reviewed the total amount of cash accounted for as having been received and handled by the taxpayer for the year by the items which are not of a taxable nature; that is, loan from the Nevada Bank of Commerce, loan from Clifford White, Cora Craft, from W. D. Fortner, payment on the purchase of car to Blake Craft.

Q. You have added all these items together?

A. Yes, sir.

Q. And the total is what?

A. \$15,300. [258]

Q. And what did you do with that \$15,300?

A. I subtracted that from \$136,000 to arrive at a gross income figure. That is, we took out non-taxable deposits.

Q. In other words, these are non-taxable receipts?

A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. And you took those out of any computation of income? A. Yes, sir.

Q. Now what figure of gross income did you arrive at?

A. For the year 1948, \$121,394.28; for the year 1949, \$29,116.09.

Q. Now would you explain the title of line 5?

A. Title line 5, "Less Liability Deduction Cash Outlay." That is deduction which the taxpayer is entitled to which were paid in cash.

Q. As you come upon each item, tell us where the information came from.

A. The information from 55(a), interest, was acquired at the Mr. White testified in the year 1949 he received \$75 interest. Line 5(b), interest paid to Joe Rosa, I prepared a schedule on that schedule (b) on the 4th page. Computation of interest on that for the years 1948 and 1949, I took the net balance as of January 1, 1948, and subtracted from that the net balance on December 31, 1948, giving an amount to apply to principal of \$23,047.47. I totalled the payments made on that note during the year 1948. They totalled \$24,765, and subtracted from that amounts applied to principal of \$23,047.47 and found the balance [259] liability as interest on that obligation paid during the year 1948. 1949 I went through the same procedure, starting with a balance due at the beginning of 1949, subtracting from that the balance due at the end of 1949, giving the amount applied to the principal, total payments for the year 1949, subtracted from

(Testimony of Forrest P. Calkins.)

that what applied to principal and the balance was liability as interest deduction.

Q. Turning then to the first page, I think you were about to approach line 5(c).

A. 5(c), interest paid W. D. Fortner. I found a check in Exhibit 30, check register, payment to W. D. Fortner in amount of \$1,044. Mr. Fortner wasn't certain, as I recall his testimony, the amount of loan. Apparently there was another loan, other than the two thousand dollars, for which he has a note in evidence. I assumed that payment of \$1,044 represented payment on the principal loan of one thousand dollars, leaving \$44 interest thereon.

Mr. Maxwell: May we have the computations returned at this time?

The Court: Yes, according to the stipulation, the baliff will collect the computations.

(Jury admonished and noon recess taken until 1:30 p.m.) [260]

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

Mr. Calkins resumed the witness stand on further:

Direct Examination

By Mr. Maxwell:

May the record show that I am delivering again to the jury copies of the computation, Exhibit No. 34.

Q. Mr. Calkins, I believe we were discussing item 5 on the first page, which is computation of net income bank deposit expenditure method, Ex-

(Testimony of Forrest P. Calkins.)

hibit 34. You had discussed liability deductions, cash outlay, interest paid to Clifford White, interest paid to Joe Rosa, and I believe you were discussing the amount of \$44 interest paid to W. D. Fortner at the close of the morning session. Had you finished your explanation of that?

A. Yes, I had.

Q. Now item (d), will you explain what that is?

A. That is interest paid to the Nevada Bank of Commerce on loan made by the taxpayer, Mr. Percifield for the year 1949, in amount of \$78.84, and amount of \$27.33 interest paid for the year 1949.

Q. Where did that information come from?

A. It came from the liability ledger sheets presented by the Nevada Bank of Commerce.

Q. All right; will you explain the next item?

A. The next item? [261]

Q. That is No. 5(e)?

A. 5(e) yes. That is broken down into two parts; that is, bank withdrawals from the First State Bank of Rangely, computations made on that is Schedules E and F; second, is Nevada Bank of Commerce. Schedule on that computation is from Schedule G.

Q. Now will you explain what you did on those schedules and how you reached the amounts that Mr. Percifield paid.

A. Schedule E, which is computation of deductible withdrawals for the year 1948, money withdrawal from the First State Bank.

Q. Just a minute—what is a computation of deductible withdrawals? I mean, what are you trying to reach?

(Testimony of Forrest P. Calkins.)

A. I am showing the method used in arriving at liability deductions.

Q. All right.

A. I start with a bank balance reflected on bank ledger sheet as of December 31, 1947, in amount of \$2,247.74. I adjusted that to show the taxpayer's bank balance on that by subtracting from that checks which had not at that time been received by the bank and charged against his account.

Q. 12-31-47?

A. Yes. Those were checks issued in the year 1947. Those checks totalled \$587.62, giving an adjusted balance of \$1,660.12.

Q. That is what he actually had in the bank, so to speak?

A. That is money actually his own, yes, sir. I added to that adjusted bank balance total deposits as shown on the bank ledger [262] sheets and on the deposit tickets of \$99,359.39, arriving at the total funds available; that is, balance at the end of the year, plus money put in, or all money available for him to withdraw, arriving at \$101,019.51. From that I subtract bank balance as shown on the ledger sheet as of the end of the year, of December 31, 1948, \$1,823.64. I subtracted from that checks which had been issued in the year 1948, but did not clear the bank as of the end of the year, making the same adjustment for outstanding checks as I discussed before, giving adjusted bank balance of \$1,729.70. Subtracting that from total funds availa-

(Testimony of Forrest P. Calkins.)

ble, I arrive at total withdrawals from bank account.

Q. In other words, in this computation you take the money he put in the bank account and add to it the balance he had at the beginning of the year and those two factors, what he had or he put in the bank, that you took away from what he had in the bank at the end of the year, that amount or money was all his withdrawals?

A. That is right. That amounted to \$99,287.72, and I subtracted from those withdrawals items which were shown on government's Exhibit 30.

Q. Which is the check disbursements?

A. Check disbursements, check register of the taxpayer, as being monies expended for other than business expenditures, that is, for the operation of the business itself. Those payments were payments on loan to Joe Rosa, payments on loan to William Bacon, payments on loan to W. D. Fortner, payment on loan to [263] the Nevada Bank of Commerce, and one item marked personal, which the bookkeeper testified that she so understood those were personal expenditure.

Q. That was how much?

A. \$150.00. Total, \$28,734. Those withdrawals I subtracted from total withdrawals and arrived at deductible withdrawals of \$70,555.72.

Q. Except for these items, called payments on loans—4 payments—and personal expenses, do I take it you have allowed every check on the First State Bank of Rangely as a deductible business

(Testimony of Forrest P. Calkins.)

expense in your computation? A. Yes, I did.

Q. All right, and that was for the year 1948?

A. 1948, yes, sir. The year 1949, Schedule F——

Q. That is the next page?

A. Yes, sir. I made similar computations, only pertaining to figures for the year 1949.

Q. And what did you find the non-deductible withdrawals were for that year?

A. Non-deductible withdrawals for that year were payments on the Joe Rosa loan of nine thousand dollars.

Q. And what was then the balance of withdrawals that you allowed? A. \$11,779.81.

Q. That is the same situation that obtained in the prior years, you have allowed every check drawn on the bank account as business [264] expense, with the exception of payment on the Joe Rosa loan? A. Yes, sir.

Q. Now what is G on the following page?

A. I made only one adjustment there for non-deductible items, and that was purchase of automobile for taxpayer's brother-in-law, Blake Craft, \$2,733.60.

Q. In other words, you took that purchase of automobile out of income because he had been reimbursed for that? A. Yes, sir.

Q. Did you allow then, with the exception of the withdrawal for that automobile, all of the checks against the Nevada Bank of Commerce as business expense?

(Testimony of Forrest P. Calkins.)

A. Yes, I did. The year 1949 I made no adjustment for withdrawals.

Q. You made no reductions in the amount of the amount of withdrawals, did you say?

A. That's right.

Q. You allowed all of the checks on the Nevada Bank of Commerce for the year 1949 as a business expense?

A. All the withdrawals, yes sir.

Q. So now can you return to the first page and read the amounts that you have allowed as business expense on bank withdrawals under item (5(e)).

A. Item 5(e) (1), First State Bank of Rangely, year 1948, \$70,555.72; year 1949, \$11,779.81. Line 5(e) (2), Neavada Bank [265] of Commerce, liability withdrawals, \$19,205.50 for the year 1948; for the year 1949, \$700.71.

Q. Now will you go to item 5(f), explain that.

A. 5(f), I believe I explained before when I was explaining line 1(b). That is the cash withheld on deposits, less cash item I referred to.

Q. In other words, that cash that he did not deposit, but listed on the deposit slips?

A. Yes, sir.

Q. You allowed all of that amount as a business expense, do I understand that?

A. Yes, sir, we have no evidence to the contrary.

Q. Now will you explain item (g)?

A. Item (g), known cash outlay expense.

Q. Can you tell us what you mean by known cash outlay expenses?

(Testimony of Forrest P. Calkins.)

A. Those are expenses the taxpayer is entitled to, for which he did not actually expend the money.

Q. You say he is entitled to, under what?

A. Under the Internal Revenue Code.

Q. He can depreciate in computing income tax?

A. Yes, sir, in this case it is in computing his business income.

Q. What are those items?

A. G(1) gives decrease in inventory as from Schedule K——

Q. All right, let us go to Schedule K and find out how you computed that?

A. By referring to the return as filed from the Nevada Club and [266] Ace High for the year 1948, they show an inventory on hand as of December 31, 1947, Nevada Club \$1,200; Ace High \$1,200. The taxpayer actually had \$2,400 inventory on hand at the beginning of the period. The income tax return showed inventory as of December 31, 1948, Nevada Club, of \$750 and Ace High Club \$1,275, or a total of \$2,025.

Q. So what that means is he had an inventory at the beginning of the year \$2,400 and at the end \$2,025?

A. Well, it means that he sold \$375 worth of inventory more than he purchased during the year 1948.

Q. He is entitled to deduct that?

A. Yes, sir. It did not appear on the cash items he has on hand in the beginning of the year.

Q. And you have allowed that as a credit to

(Testimony of Forrest P. Calkins.)

income? A. Yes, sir, I have.

Q. Let us go to line G-2 on this front page again.

A. Line G-2 is depreciation from the Ace High Club and Nevada Club, as shown on the income tax returns as filed for the years 1948 and 1949.

Q. Well, then, what result did you reach in line 5(b)?

A. Line 5(b) is total deductions to arrive at adjusted gross income.

Q. In other words, those are total deductions which you were notified the taxpayer was entitled to each of the years 1948 and 1949?

A. Yes, sir. [267]

Q. How much?

A. \$106,278.74 for the year 1948; \$20,254.72 for the year 1949.

Q. And so you have reached the amount of adjusted gross income in line 6 by doing what?

A. By subtracting the liability deductions from gross income figure of \$121,394.28 for the year 1948.

Q. That is on line 4?

A. Line 4, yes, sir.

Q. You subtract line 5(b) from line 4?

A. Yes.

Q. And what result did you reach there?

A. I reached the adjusted gross income for the year 1948, line 6, \$15,095.54; year 1949, \$8,861.37.

Q. And in line 7 what did you do?

A. I subtracted, or allowed, standard deduction. For the year 1948 taxpayer's adjusted gross income

(Testimony of Forrest P. Calkins.)

was in excess of ten thousand dollars, ten per cent one thousand dollars, allowing standard deduction allowed in the maximum of one thousand dollars. For the year 1949, adjusted gross income was \$8,-861.37, allowed ten per cent of that as standard deduction, in amount of \$886.14, to arrive at net income as shown on line 8.

Q. In line 5 you allowed certain liability deductions and line 7 you are allowing another deduction, how does that happen? There is quite a difference between those two items.

A. The law allows certain deduction expenses not incurred in your trade or business. To put it simply, I might say in arriving [268] at the adjusted gross income, the taxpayer is entitled to deduct non-business expenses, the deductions allowable by law, in arriving at net income are more of a personal nature of the taxpayer.

Q. Will you name some of those?

A. Contributions, interest, taxes paid on behalf of the individual, personal taxes, losses from fire or theft, medical deductions, which have restrictions, and miscellaneous deductions.

Q. You have allowed a standard deduction, in lieu of those items?

A. Yes, I have.

Q. Why is that?

A. The only reason I can give is the generosity of the government. No, I won't say that. I think it has been found that the average taxpayer does not have more than ten per cent of his income used

(Testimony of Forrest P. Calkins.)

in deductible expenditures and there would be a thousand dollar limitation.

Q. In the records here did you find ten per cent of the adjusted gross income was more than the specific deductions, such as you have named?

A. No, sir, I did not.

Q. So you did not allow the maximum there of the standard deductions? A. No, sir.

Q. Then you subtracted the standard deduction from the gross income? [279] A. Yes, sir.

Q. And what did you reach?

A. The net income.

Q. That is line 8? A. Yes, sir.

Q. What is that amount?

A. For the year 1948, \$14,095.54; for the year 1949, \$7,975.23.

Q. And then line 9 what did you do?

A. Line 9 I scheduled the net income as shown by the returns filed by the taxpayer.

Q. And that was what?

A. For the year 1948 I had to add the total for the two returns filed, arriving at a net loss of \$7,087.03. The year 1949 return showed a net loss of \$3,923.07.

Q. Then what figure did you arrive at in line 10?

A. Line 10 shows understatement of income.

Q. Understatement of income on the return?

A. Yes, sir.

Q. That was how much?

A. For the year 1948, \$21,182.57; for the year 1949, \$11,898.30.

(Testimony of Forrest P. Calkins.)

Q. Before you turn the page, we have gone down and explained this first page item by item, is that correct? A. Yes, sir. [270]

Q. Can you give me a very brief summary of exactly what you did, in general?

A. In general I took all the cash received by the taxpayer, added to that—that is, all the cash of which there was a record—added to that expenditures paid with cash. I subtracted from that figure all monies received from sources other than taxable sources. I subtracted from that liability deductions, business deductions of the taxpayer incurred for the year 1948 and 1949. From that I subtracted the standard deductions, arriving at the net income figure for 1948 and 1949.

Q. Now on page 2, can you tell me generally what page 2 of Exhibit 34 is?

A. Page 2 is another method of computing the taxpayer's net income. That is the net worth.

Q. Now that is completely different from the bank deposit method, is it?

A. It is a different computation, yes, sir.

Q. And as a matter of fact, it takes different items and evidence into consideration, does it?

A. Yes, it does. The main difference between the two, deposit and expenditure method is based on activities during the period, whereas your net worth method is based, basically and primarily, on fixed period of time. It is one fixed time, set time, as against another fixed time.

(Testimony of Forrest P. Calkins.)

Q. Will you say generally what you have done on this page 2?

A. Page 2 I listed all the assets that are in evidence here; [271] I listed all his liabilities; I listed both the assets and liabilities as of January 1, 1948, December 31, 1948, and December 31, 1947. I subtracted the total liabilities from the total assets to arrive at the taxpayer's net worth of his investments in assets.

Q. Is that a cost basis?

A. On the cost basis.

Q. So that considered only what he paid for it?

A. Yes.

Q. It doesn't consider how much it may have increased or decreased in value? A. No.

Q. Is his increase or decrease in value taxable?

A. No, it is not.

Q. When you arrive at net worth figure at 1-1-48, December 31, 1948, December 31, 1949, then what do you do?

A. I subtracted my opening net worth, or net worth at the beginning of the period, from net worth at the end of the period. That shows the increase during the period.

Q. That shows how much more, if there is more, he had at the end of the year than he had at the beginning? A. Yes, sir.

Q. Then what did you do, generally?

A. I made certain adjustments to that. I reduced this increase in net worth by the proceeds

(Testimony of Forrest P. Calkins.)

from sale of cattle, which I believe Mr. [272] Fortner——

Q. I would rather have what you did generally and then go down and tell us a little more in detail.

A. Generally I made certain adjustments, which do not reflect in the assets or liability section of this net worth statement.

Q. And you arrived at a figure for that income, did you? A. Yes, I did.

Q. At the top of the schedule for assets, will you tell us what you included in assets for net worth?

A. In assets for net worth I included cash on hand, as testified to by Mr. Bell, bank account balances.

Q. How much was cash on hand?

A. Cash on hand, five thousand. The bank balances for the First State Bank of Rangely for the period January 1, 1948, 12-31-48, December 31, 1949, Nevada Bank of Commerce listed balance as of January 1, 1948, December 31, 1948, and account had been closed out during the year 1949 as of the end of '49; in other words, the basic two accounts listed separately for January 1, 1948, balance as of December 31, 1948, and balance as of December 31, 1949, on both accounts. I then listed inventories in the Nevada Club and Ace High Club for dates January 1, 1948, December 31, 1948, and December 31, 1949.

Q. Now I see you have that figure given here on inventory at the end of 1949? A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. Can you explain where you got your inventory figures in all three of these columns? [273]

A. The inventory figure as of January 1, 1948, for the Nevada and Ace High Clubs was shown on the income tax returns. The inventory as of December 31, 1948, was also shown on the income tax returns. The inventory for December 31, 1949, I took from statement made by Mr. James Bell in his testimony as to what the taxpayer told him the inventory was substantially the same both years.

Q. Now let us go to item (d).

A. Item (d), frame building in Nevada. I took the figure from the income tax returns as filed. 1947 return showed that as of January 1, 1948; 1948 return showed it as of December 31, 1948, 1949 showed asset as of December 31, 1949.

Q. And the next item?

A. (e), equipment Nevada Club, 1947 return——

Q. You are referring to 1948 return. Take 1948 and 1949, 1947 return is not in evidence. And then the next is the Ace High Club, line 1.

A. Line 1 is the Nevada Club. Those figures were taken from the '48-'49 return.

Q. And next one, the Ace High Club?

A. The Ace High Club was computed on the testimony of Mr. Rosa, the fact that he sold the club in '45 for \$70,000, and the inventory was valued at \$3,500, giving a value to the Ace High of \$66,500.

Q. The next item is the Ace High Club.

A. Gambling equipment purchased by the tax-

(Testimony of Forrest P. Calkins.)

payer in the year 1949. I think Mr. Stroud so testified. [274]

Q. I believe his documents are in evidence here?

A. Yes, sir.

Q. Household furniture?

A. Household furniture was based on testimony of Special Agent Bell when he stated that the taxpayer told him he had household furniture of about \$500 throughout the period.

Q. The Chevrolet?

A. Was taken from the testimony of Mr. Bell, in similar manner, he testified the taxpayer told him he had a Chevrolet worth approximately \$150 throughout the period.

Q. And automobile?

A. The automobile—we have two automobiles involved. The one listed as of January 1, 1948, and December 31, 1948, was taken from testimony of Special Agent Bell. In regard to the 1946 Buick, the taxpayer estimated that value at \$2,400. December 31, 1949, reflects the total cost price to the taxpayer of the 1949 Buick.

Q. And what was that based on?

A. That was based on the testimony and documents presented by the bookkeeper of the sales organization.

Q. And you totalled the assets, did you?

A. Yes, sir, I did; item L, total assets.

Q. What were those totals as of each date?

A. As of January 1, 1948, total assets, \$88,-617.81; as of December 31, 1948, total assets, \$88,-

(Testimony of Forrest P. Calkins.)

992.24; as of December 31, 1949, total assets, \$88,570.71. [275]

Q. The assets did not increase very much, did they?

A. No, sir, they did not. In fact, they decreased.

Q. Now the liabilities.

A. Liabilities (2) I listed the loans and notes payable as set out in the evidence in the case.

Q. And will you state what those were?

A. Joe Rosa note, one to which he testified, I think there was a Mrs. Rosa also testified about note payments.

Q. And where did these figures come from in your three columns?

A. These figures came from record of payments.

Q. And the first figure is that amount owing to Mr. Rosa, or the amount paid?

A. The amount owing.

Q. That is how much as of January 1, 1948?

A. As of January 1, 1948, amounts to \$49,500.

Q. And as of December 31, 1948?

A. \$27,452.53.

Q. That is a decrease of some 22 thousand?

A. Yes, sir. On December 31, 1949, it showed on that note \$20,559.73.

Q. Now the next item?

A. Was William Bacon note.

Q. And he owed?

A. He owned, as of January 1, 1948, \$6,500. He owed one thousand dollars as of December 1, 1948,

(Testimony of Forrest P. Calkins.)

and one thousand dollars as of December [276] 31, 1949.

Q. And the Jackson?

A. Jackson loan was \$4,000 due as of January 1, 1948; \$7,500 due as of December 31, 1948, and \$5,500 due December 31, 1949.

Q. And Mr. Fortner?

A. Mr. Fortner, at the beginning of the year, January 1, 1948, he owed Mr. Fortner \$2,000. End of 1948, December 31, he owed \$1,700, and December 31, 1949, \$1,140.

Q. Now the next item.

A. Next item, the Nevada Bank of Commerce. Balance due them as of January 1, 1948, \$2,000. As of December 31, 1948, \$1,000. That note was paid off in the year 1949, with no balance due the said bank December 31, 1949.

Q. And the next?

A. Clifford White. He owned note liability to Clifford White as of January 1, 1948. As of December 31, 1948, the taxpayer owed him a balance of \$2,500. The year 1949 no payments were made; as of 12-31-49, \$2,500.

Q. The next item?

A. Cora Craft. The taxpayer borrowed in 1948, \$3,500. Balance due at the end of 1948, 12-31-48, was \$3,500. No payment was made on that note in 1949, leaving balance on it of December 31, 1949, of \$3,500.

Q. Item 8 is chattel mortgage G. M. A. C.?

A. Yes, sir, there was a balance due on the

(Testimony of Forrest P. Calkins.)

automobile purchased by the taxpayer for the year 1949 in amount \$2,249.47, as of December [277] 31, 1949.

Q. And then you arrived, after adding all those up at a total figure liabilities at each one of these periods? A. Yes, sir, on those given dates.

Q. What was the amount of liabilities which you arrived at?

A. Total liabilities on January 1, 1948, \$64,000; on December 31, 1948, total liabilities, \$44,652.53; on December 31, 1949, total liabilities were \$36,449.20.

Q. Did the amount of monies Mr. Percifield owed go up or down? A. It went down.

Q. In other words, he didn't own as much at the end of 1949 as he did at the beginning of 1948?

A. No, sir, he did not.

Q. How did you arrive at the figure you have here for net worth?

A. I arrived at that figure by subtracting total liabilities on each given date from the total assets on that same date.

Q. And how much did you arrive at then January 1, 1948?

A. January 1, 1948, I determined the taxpayer's net worth to be \$25,617.81.

Q. And how much was his net worth at the end of that year, 1948? A. \$34,339.71.

Q. That is an increase of some \$18,000?

A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. And what was his net worth then at the end of the next year, 1949?

A. End of 1949 the taxpayer's net worth was \$52,122.51.

Q. And that was an increase of some [278] \$7,000? A. Yes, sir.

Q. How did you compute those figures, from year to year, beginning year to year?

A. You subtract the net worth beginning of the period from the net worth at the end of the period.

Q. And you arrived at the increase?

A. At the increase, yes, sir.

Q. Did you figure out on line B the exact amount of increase for 1948?

A. Yes, sir, I did. Increase for 1948, \$18,721.90; increase net worth 1949, \$7,781.80.

Q. After you had found those figures for net worth for each of the years, 1948 and 1949, then what did you do?

A. I subtracted from them items which are not reflected in the net worth statement and also added non-deductible expenses which could be reflected in the net worth statement.

Q. In other words, you subtracted certain items, did you?

A. I added some items and subtracted some items, yes, sir.

Q. Let us go to the items you subtracted. (C) What was the first item subtracted?

A. Proceeds from cattle sales that Mr. Fortner

(Testimony of Forrest P. Calkins.)

made for the taxpayer and retained as against the liability.

Q. Why did you subtract that?

A. That shows adjusting—he had no asset for the cattle. We have no reflection of the cattle bill because Mr. Fortner already testified he did not know the true cost of the cattle. [279]

Q. So, because he didn't know the true cost of the cattle, you didn't include it in the net worth asset?

A. No, sir. We did not do a computation as to any profit or loss on this.

Q. In other words, you eliminated the proceeds from the sale from the net worth increase?

A. Yes, sir.

Q. So it wouldn't be reflected on any net worth figures? A. That is right.

Q. Then what else did you subtract there?

A. Subtracted depreciation liability, as set forth on the Ace High Club in returns for the Ace High Club and Nevada Club, and as you will notice up in the assets section, lines D, E, F and G, the assets remain constant as to cost; that is, the cost price remains constant. Therefore, by carrying the net cost, it did not reflect either increase or decrease, so to allow the taxpayer depreciation, we have to make an adjustment.

Q. That depreciation does not represent any money expended by the taxpayer?

A. No, sir.

Q. But it is amounts allowable to him by law?

(Testimony of Forrest P. Calkins.)

A. Yes, sir.

Q. And you have subtracted that from the increase of net worth as well? A. Yes, sir.

Q. And by subtracting these items from increase of net worth what figure do you get? [280]

A. The total assets subtracted for the year 1948 was \$6,219.12, leaving \$12,502.98 for the year 1948. For the year 1949 these items totalled \$5,293.95, leaving net increase in net worth \$2,487.85.

Q. Now, then you added certain amounts; is that right? A. Yes, sir.

Q. And these deductible expenses?

A. Yes.

Q. Why did you add these amounts to the net worth figure you read here?

A. They again are not reflected in the assets or liabilities on this net worth statement.

Q. What were those items?

A. One item was living expenses; \$3,000 for the year 1948 and \$3,000 for the year 1949.

Q. What is this item 2, loss on trade-in on Buick, Schedule L?

A. That is loss sustained by the taxpayer on trade-in of 1946 Buick.

Q. Turn to Schedule L and I will ask you to explain that to us.

A. Schedule L shows computation loss on trade-in of 1946 Buick. Using the cost basis testified to by Special Agent Black, as being told him by the taxpayer, \$2,400, subtract from that trade-in al-

(Testimony of Forrest P. Calkins.)

lowance for purchase of 1949 Buick, \$609.80. Taxpayer sustained a loss of \$1,790.20.

Q. Is loss on trade-in of a personal automobile deductible?

A. Not on a personal automobile; no. [281]

Q. Then what figure did you arrive at in item III, line E?

A. III E, adjusted gross income for 1948, \$15,502.78; for the year 1949, \$7,278.05.

Q. And from that you took away the standard deductions as you explained previously?

A. Yes, sir.

Q. And what net income then did you reach by the net worth method?

A. By the net worth method, I arrived at a net income for 1948 of \$14,502.78; for 1949, \$6,550.24.

Q. And the net income, did you compare with the net income on the return? A. Yes; I did.

Q. And that was a \$7,000 loss and \$3,900 loss?

A. Yes, sir; for the years 1948 and 1949.

Q. What was the understatement then of that income on those returns for the years 1948 and 1949?

A. For 1948, understatement on the return was \$21,589.81. For the year 1949, \$10,473.31.

Q. Now, that is the computation on the net worth method; is that right? A. Yes, sir.

Q. Now, will you very briefly tell me what you did in doing the net worth method again?

A. I start at the net worth beginning of the period 1948 to the end of the period 1948—to the end of the year 1949. [282] To do that I totalled all the

(Testimony of Forrest P. Calkins.)

taxpayer's assets, all his liabilities, subtracted the total liabilities from the total assets and arrived at the net worth figure. I subtracted the beginning net worth figure from the ending net worth figure to arrive at the increase in net worth. I made certain adjustments, deducting items that did not reflect in the net worth statement. I allowed depreciation, which was not reflected in the net worth statement. I added back living expenses and non-deductible losses, to arrive at adjusted gross income. I subtracted from that the standard deductions allowed by law and arrived at the net worth.

Q. I notice net income by bank deposit method is a little bit different than net income by net worth method. Now, can you explain why there is a difference, if there is a feasible explanation, and I think there is.

A. The net worth reflects basically asset, ownership in assets, and expenditures dealing with the flow of money, which is harder to pinpoint.

O. And the result is approximately the same, but slightly different?

A. If we have all the figures from the transactions during the year complete, the net worth, we should come out fairly close; yes, sir.

Q. In either of these methods, in computing either one, computing income by either method, the bank deposit method or the net worth method, do you know of any item, here in evidence, or in [283] the testimony, which could possibly be allowed Mr. Percifield, on the basis he prepared his return, kept

(Testimony of Forrest P. Calkins.)

his books, cash records, and cash receipts, that has not been allowed?

A. No; I can't remember any.

Q. You tried to include every one of those he was entitled to? A. Yes, sir.

Q. Now, Mr. Calkins, I am going to hand you another piece of paper here and see if you can tell me what it is.

A. Attached sheet is computation of tax based on net income assets, computed on deposit and expenditure method for the year 1948.

Q. And what are the other sheets?

A. The other sheets, page 2 is computation of tax based on net income on deposit and expenditure method covering the year 1949. Page 3 is computation of tax based on net worth method arriving at net income for the year 1948; and page 4 is computation of tax arriving at net income on the net worth method for the year 1949.

Q. Did you prepare these computations?

A. Yes, sir; I did.

Q. Are they based upon the figures you have computed as income in Exhibit 34?

A. Yes, sir; they are.

Mr. Maxwell: I will offer this as government's Exhibit 35 in evidence.

Mr. Puccinelli: There will be no objection. [284]

The Court: The offer on the part of the government will be received in evidence as government's Exhibit 35.

Mr. Maxwell: May the record show that the same

(Testimony of Forrest P. Calkins.)

stipulation as to Exhibit 34 pertains to Exhibit 35? I would like to pass copies to the jury.

Mr. Puccinelli: It has been so stipulated.

The Court: Very well, the record will show the stipulation.

Mr. Maxwell: May the record show that I now pass copies of Exhibit 35 to the jury.

A. Now, Mr. Calkins, I take it Exhibit 34 represents your computation of income tax due on amount shown in Exhibit 34 as net income of the defendant, Raymond Percifield? A. Yes, sir; that is right.

Q. So, will you take this first sheet here, and explain what it is?

A. Page 1 is computation of tax based on deposit and expenditure method. Line 1, net income——

Q. For what year?

A. Year 1948, and to get net income as shown on the computation of deposit and expenditure method, 1948, \$14,095.54; subtract from that, liabilities, personal exemptions for the taxpayer, five dependents at \$600, which was a total of \$3,000, leaving net income subject to tax, \$11,095.54. In 1948, the law provided that a taxpayer filing a joint return, husband [285] and wife, may have the same benefit as those filing separate returns for community property, referred to as split income division, each takes one-half. I divided the tax on the income subject to tax by two to arrive at the net income subject to tax, \$5,547.77. I computed the community tax on that figure in amount \$1242.42.

(Testimony of Forrest P. Calkins.)

Q. What did you use to do that?

A. I used the surtax schedule to determine that; that is, the graduated table. I arrived there at \$1242.42, subtracted from that, credits allowable by law on the first \$400, 17 per cent or \$68.00; credit on \$842.42 at 12 per cent or \$101.09; total credit allowable, \$169.09. Subtract that from the tentative tax to arrive at one-half of the regular tax, which was \$1,073.33. Corrected tax was computed by two, line just above that, or one-half of corrected tax, resulting in corrected tax of \$2,146.66. From that I subtracted the income tax per return, which was zero per return, understatement per return, \$2,146.66

Q. Now, on page 2, what did you do?

A. Computed tax on income as computed on the deposit and expenditure method for the year 1949.

Q. The computation is substantially the same form as for the year 1948? A. Yes, sir; it is.

Q. How much tax did you arrive at due for the year 1949 from the bank and expenditure method?

A. \$852.82. [286]

Q. And what was the tax on the return?

A. Zero.

Q. And understatement of tax would be the same, \$852.82? A. Yes; it would.

Q. Now what did you do on page 3?

A. Page 3 I made a computation of tax based on income computed on the net worth method, which is page 2 of government's Exhibit 34.

Q. How much tax did you find due for the year

(Testimony of Forrest P. Calkins.)

1948 on the net worth method? A. \$2,239.84.

Q. And again the income taxable on the return was zero and understatement of tax, \$12,239.84?

A. Yes, sir.

Q. And on page 4?

A. Page 4 I made a computation of tax on net income as computed on the net worth method for the year 1949.

Q. Similar computation as you made previously?

A. Yes, sir. Corrected income tax for the year 1949 was \$589.34.

Q. And income tax per return? A. Zero.

Q. And the understatement of tax?

A. \$589.34.

Mr. Maxwell: We have no further questions.

(Jury admonished and recess taken at 3:00 for 15 minutes.) [287]

3:15 P.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

The Court: Proceed with the cross-examination.

Mr. Maxwell: May copies of the exhibits be returned to the jurors?

Mr. Puccinelli: Yes.

MR. CALKINS

resumes the witness stand on:

Cross-Examination

By Mr. Puccinelli:

Mr. Puccinelli: Mr. Calkins, because I am not a tax expert, I am going to question from a seated position by my accountant. It is not intended as a reflection on you whatsoever, and I trust that you and the jury will accept it as such.

The Court: I might say further so the jury, we all know these are rather technical matters and counsel need the suggestion of technical men; and by sitting at the counsel table, it gives counsel an opportunity to consult with expert witnesses, as government counsel have here.

Q. Mr. Calkins, I refer you, first of all, to your computation, being plaintiff's Exhibit 34, and we will confine ourselves to that, for this portion of the cross-examination at least. Now, under item 2, which takes into consideration your Schedules I and J—— A. Yes, sir. [288]

Q. I will take Schedule I first. The item there with reference to living expenses, \$3,000.

A. Yes, sir.

Q. Now, having that figure in mind, and that schedule, I refer you to schedule E, which is the computation of withdrawals from the First State Bank at Rangely. A. Yes, sir.

Q. The next to the last line there, which reads, "Personal Expenditures, \$150." A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. Is that taken into consideration in the item on Schedule I of living expenses?

A. It is in this way; in that the testimony I heard yesterday reflects the taxpayer has living expenses of \$3,000. We have nothing else that was heard or seen in this trial showing what that \$3,000 is comprised of. This \$150, I did not see the check myself, as I don't know whether it was cash or what was its position. I reduced it in Schedule E, or figured out of the total withdrawals, in an attempt to arrive at the particular figure, which I call deductible withdrawals allowable against income, in arriving at the adjusted gross income.

Q. As I understand it, then, on Schedule I that sum of \$3,000 as entered there could be \$2,850?

A. Yes; it could; yes, sir.

Q. Now, I refer you to the item listed under 5(b), which is the interest paid Joe Rosa, and I refer you to Schedule B, which is [289] on page 4.

A. Yes, sir.

Q. I will give you what is marked plaintiff's Exhibit 20 in evidence, which is the Joe Rosa note.

A. Yes, sir.

Q. I refer you to line 15 on that exhibit, which starts 12-1-48; and would you read that out loud, please? I am referring to Exhibit 20 in evidence.

A. Starts out 12-1-48—"As per parties' agreement, the principal balance due this date is \$28,-373.00 with interest paid 11-5-48."

Q. Now, will you read the line immediately above that entry?

(Testimony of Forrest P. Calkins.)

A. "November 23, 1948," in column Paid on Interest; ditto marks, column Paid on Principal. Paid on principal, \$1,250. Interest paid, interest due column is blank; amount paid column, \$1,250. Balance of principal column, \$27,250; and the final column, received by, initials J. R.

Q. What do those two lines mean?

Mr. Maxwell: Well, your Honor, I believe the document speaks for itself.

Mr. Puccinelli: Well, your Honor, the schedules speak for themselves, but he was allowed expenses. What that was, I think I know; but I want the jury to know.

Mr. Maxwell: From an accounting standpoint?

Mr. Puccinelli: Yes.

Mr. Maxwell: I have no objection to that at all. [290]

The Court: Very well. You asked what do those two items mean?

Q. Yes; primarily the two ending balances. What that means, I mean the difference?

A. It would indicate to me that apparently too much interest had been charged and not enough had been applied to the principal payments up to and including that date. In other words, we have a balance, as of November 23, 1948, after payment was received, of \$27,250; and the notation here says by agreement of parties, balance as of this date, or 12-1-48, \$28,737.

Q. Could it also mean, Mr. Calkins, that interest could have been added to the face value of the note?

(Testimony of Forrest P. Calkins.)

A. I wouldn't say so, from the wording here; no, sir.

Q. I will refer you then, back to the first page of your Exhibit 34, the item 5-E-1.

A. Bank withdrawals from the First State Bank of Rangely; yes, sir.

Q. Now, referring to your Schedule E, and at the same time referring to Schedule B, reading first then on Schedule B, which is entitled, "Joe Rosa Note," going down to the fifth line in the body of it, it says, "Payment applied on Principal, \$22,-047.47." A. Yes, sir.

Q. Now, keeping that in mind, and going to Schedule E, under Non-Deductible Withdrawals, the first item under that, "Payments on Loan to Joe Rosa, \$21,015." [291] A. Yes, sir.

Q. That makes a difference of \$1,032.48?

A. It is approximately that; yes.

Q. Why is that difference?

A. The difference being that all the payments I tried to trace back from Exhibit 20 apparently were not paid by check were paid through the bank account at Rangely. The only items I took into account in Schedule E are those represented by payments through the bank account.

Q. Now, Mr. Calkins, on the front page of the computation, again being Exhibit 34, under 5-G-2, I notice the depreciation for 1948, \$4,394.50, and for 1949, \$3,100. A. Yes, sir.

Q. Can you explain why the difference in those two years?

(Testimony of Forrest P. Calkins.)

A. The depreciation I took as shown on income tax returns filed. I had no basis for charging that without seeing the property.

Q. I see. I think I will have to refer back to a previous question with reference to the note, when I asked you to read that Joe Rosa note. If that difference reflected there on those two items were actually interest added to the face of the note, would that amount, the difference, would that amount be under non-cash outlay expense?

Mr. Maxwell: I don't understand the question. If the witness does, he may answer; but I certainly don't.

Q. In other words, you will recall, Mr. Calkins, you read from plaintiff's Exhibit 20, that one line, in which parties agreed [292] the principal balance due this date is \$28,737. A. Yes, sir.

Q. And then the previous entry for November 23, 1948, was \$27,250. A. Yes, sir.

Q. As I compute, the difference is \$1,487. If that were interest added to the face value of the note, would that interest be under non-cash outlay expense?

Mr. Maxwell: May it please the Court, I think the witness has already answered the question, that he said those could mean——

Mr. Puccinelli: I asked him if that was the case.

The Court: Counsel is asking, I assume, a question based on that, and if the question is intelligible——

(Testimony of Forrest P. Calkins.)

Q. Is it intelligible?

A. I am not quite sure. I might clear it up if I asked a question. I am wondering if——

Q. Well, let's assume, for the purpose of the answer, assume that the difference is interest added to the face value of the note.

Mr. Maxwell: What difference?

Mr. Puccinelli: \$1,487.

Mr. Maxwell: Between what?

Mr. Puccinelli: Those two items, \$1,487.

Mr. Maxwell. If the witness understands the question, I am perfectly satisfied to have him [293] answer.

The Court: He will take care of it himself.

Mr. Brown: Is that fact in evidence?

Mr. Puccinelli: It is on Exhibit 6 in evidence. That entry hasn't been described as to what it is exactly. It could be one of three different things.

Mr. Brown: We have no objection.

A. You mean interest previously had been paid at this time but included and added to the note——

Q. To the note instead of interest, which is added to the face value of the note?

A. Taking this into consideration, the note on there, I would say no.

Q. May I ask you a hypothetical question? Let's assume that I get a thousand dollars on a note carrying six per cent interest. At the end of the year I haven't paid the interest, which I would figure to be \$60. So, then that note is cancelled and

(Testimony of Forrest P. Calkins.)

a new note made for \$1,060. Is then that \$60 a non-cash outlay expense?

Mr. Maxwell: I believe that question is objectionable, based on facts not in evidence.

Mr. Puccinelli: The analogy is there on those exhibits in evidence. Those items are there, if your Honor please, and haven't been described.

The Court: I can answer that in my way. It seems to me obvious that one note is given for another. This is a new note, and start there.

Mr. Maxwell: Your Honor, I do not believe there was a [294] new note. We have the same note.

Q. We have this same one thousand dollar note to which I referred. I do not pay interest at the end of the year, so on the same note we would then owe \$1,060. Would that \$60 interest be a non-cash outlay expense?

A. Not on the net worth basis. It would increase the liability and carry that note at \$1,060 rather than a thousand. On your expenditures it would have no bearing, in that on a cash basis you would not pay that and you would not be entitled to deduction and you would make no adjustment.

Q. Do you have plaintiff's Exhibits 1 and 2?

A. The returns?

Q. Yes. A. Yes; I have.

Q. Do you have those handy? Now, referring to line 9 of your computation, which is plaintiff's Exhibit 34, you have the net income per returns filed under the column 1948, \$7,087.03, which is a loss. A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. Now, will you refer then to plaintiff's Exhibit No. 1; is that 1948?

A. We have two 1948 returns.

Q. Refer to both of them. A. Yes, sir.

Q. In the schedule appearing on page 2—just explain this, just [295] explain how you arrived at the figure \$7,087.03, listed under the 1948 column, in line 9 of your computation.

A. Two returns were filed, one showing operation of the Ace High in Rangely, Colorado, the other showing the operations of the Nevada Club at Wendover, Nevada.

Q. Will you read what the loss was, with reference to the Nevada Club?

A. The Nevada Club showed a net loss on page 2, Schedule C of the return of \$6,751.37.

Q. What was the same result for the operation of the Ace High Club?

A. Page 2, Schedule C of the return for 1948, showing Ace High activities, showed a net loss of \$335.66.

Q. Is that a net loss? A. No, sir; it is not.

Q. It is a net profit? A. Yes, sir.

Q. Will you read the figure again?

A. \$335.66. Schedule shows \$336.66.

Q. Does that make a difference in your computation?

A. It will make a difference in line 10, understatement of net income, of approximately \$670. It would not make a difference in computation for 1949.

(Testimony of Forrest P. Calkins.)

Q. It would for 1948? A. Yes, sir.

Q. That was approximately \$670? [296]

A. It would be just double the \$335.66.

Q. And is that to the defendant's benefit, or whose benefit; the error that you have made?

A. The error I made is in favor of the government.

Q. Referring then again to page 1 of your computation, which is plaintiff's Exhibit 34, in figuring the computation for the year 1949, you heard the testimony, yesterday, of Blake Craft, I take it?

A. Yes.

Q. And he testified there was \$600 due him as of December 31, 1949? A. Yes, sir.

Q. Which Mr. Craft stated was reported by Mr. Percifield and social Security had been paid on it. Do you recall that testimony, yesterday?

A. As I understood it, his testimony was that social security had been paid on it, that he had reported it as income on his return.

Q. That he had reported it as income on his return? A. That was my understanding.

Q. Have you taken that into consideration for the year 1949? A. No.

Q. And that amount was \$600 for the year 1949, as testified by Mr. Craft?

A. I think it was vague. It was approximately \$600.

Q. Now, if you will turn to page 2 of your computation. This is [297] computation of net income under net worth method? A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. I think you stated to one of the final questions asked you by Mr. Maxwell that you took all your figures in the most favorable light to the defendant from the exhibits in evidence?

Mr. Maxwell: —

Mr. Puccinelli: Wait a minute—the returns as filed in evidence; yes.

Mr. Maxwell: I object. I asked no such question. I will ask the reporter to read the question.

The Court: You will never find it. Ask the witness what he said.

Q. Do you recall?

A. Will you repeat that again?

Q. My question was, I thought one of the last questions asked by Mr. Maxwell that you had, in figuring your computations taken your figures from exhibits in evidence and from testimony adduced up to this point? A. Yes.

Q. And that further, in regard to the income tax returns, you had used the figures there in the most favorable light to the defendant.

A. I don't recall reference to that.

Q. That is what I understand. Would that be your testimony now?

A. Took the figures from the income tax return most favorable?

Q. Yes. In other words, did you try to get the figures most [298] favorable to the government or most favorable to the defendant?

A. I tried to get the figures I thought were correct.

(Testimony of Forrest P. Calkins.)

Q. Assuming that you got them out of the evidence—I don't mean that you fabricated—

Mr. Brown: I think the witness has answered the question, your Honor.

Mr. Puccinelli: There again is our difference of understanding. I am sure he has not.

The Court: Well, counsel, you will be given an opportunity to search the record and find out to your satisfaction. Do you want to check with the reporter now?

Mr. Puccinelli: I would like to, please. We will dispense with that for the moment, in the interest of getting along.

Q. Referring to line 1-G of the computation on the Ace High Club, you show there \$66,500.

A. Yes, sir.

Q. On all three columns? A. Yes, sir.

Q. If you will refer to the income tax return again and the depreciation schedule on the return for the Ace High Club for the year 1948—

Mr. Maxwell: Counsel, is your question directed to the figure all the way across? If so, I think the witness should also look at the 1949 return. [299]

Mr. Puccinelli: Let us confine ourselves to 1948 for this moment. Will you look at the depreciation schedule for the year 1948?

A. Yes; on attached schedule.

Q. What is that figure?

A. Depreciation, a total of four thousand.

Q. And what is the cost value of the buildings?

(Testimony of Forrest P. Calkins.)

A. Fifty thousand dollars.

Q. And the furniture and fixtures?

A. \$18,945.28.

Q. Now what does your figure of \$66,500, in your column 12-31-48; what does that figure reflect?

A. That reflects the total cost to the taxpayer of everything with the exception of inventory, including land, building, furniture and fixtures and everything else that was on the place.

Q. And what is it in the income tax return?

A. The building is broken down by building and furniture and showed \$50,000 for the building and \$18,945.28 for the furniture.

Q. And the total? A. \$68,945.28.

Q. Roughly, how much is the difference between the one in the income tax return and the one in your schedule? A. It would be about \$2,500.

Q. You have then reduced the basis of cost from that indicated in the income tax return? [300]

A. Well, it works both ways; yes, sir. What I did was to take \$70,000 already testified by Mr. Rosa, which he testified included \$3,500 inventory, which charge would not properly be included in the cost of the club itself, and there was no further breakdown in evidence.

Q. Will you refer to the return for 1949, to the Ace High Club; and what is the total figure there of the depreciation item?

A. Total cost figure under depreciation item for building and furniture and fixtures is \$68,500.

(Testimony of Forrest P. Calkins.)

Q. And therefore in your computation for 1949 you reduced that figure again?

A. Well, as I said before, my figure is based on testimony of Mr. Rosa.

Q. I mean you have reduced it from that joint return?

A. Yes; it is reduced.

Q. Now, on your schedule of the net worth computation, referring to line 1-H under Gambling Equipment Ace High Club.

A. Yes, sir.

Q. Under the final column, 12-31-49, you have listed \$511.30.

A. Yes, sir.

Q. From the evidence which has been adduced thus far, how would you state that you know that this was not a deductible expense?

A. I believe the witness testified to that, testified that it was gambling equipment of one form or another.

Q. I show you what has been marked plaintiff's Exhibit 26 and [301] Exhibit 27 in evidence, which are the invoices from the Salt Lake Card Company, and ask you if you remember when those exhibits were introduced in evidence?

A. Yes, sir.

Q. And will you read what is on the face of those two exhibits? Just to make it shorter, just generally what is included on those?

A. On government's Exhibit 26, blackjack layout, crap layout, giving the dimensions. Do you want that too?

Q. No. How much money was involved?

A. \$152.50.

Q. Do you know what a crap layout is, Mr. Calkins?

A. Yes; the felt cloth.

(Testimony of Forrest P. Calkins.)

Q. Now, will you read generally what is on the other exhibit?

A. On government's Exhibit No. 27, we have four different orders of square edge crap chips.

Q. Do you know what those are?

A. Those are—they are what are referred to as chips.

Q. That's right. Aren't those deductible items? Couldn't they be replacing other items?

A. They could be replacing them; yes, sir.

Q. And as such, wouldn't they be deductible?

A. Depending on how they would be handled. It could be considered as a deductible item.

Q. Now, referring again to the computation of the net worth method, item 1-K, automobile, the figure appearing in the column [302] under the heading 12-31-49. A. Yes, sir.

Q. And the amount appearing there is \$3,461.87. I think that would be the cost price of the automobile. A. Yes, sir; that is total cost price.

Q. I show you what is marked defendant's Exhibit A, which purports to be a car invoice, I believe, for that car. What is the cost amount of that car, as reflected by that invoice?

A. It reflects sold for cash price \$3,109.08.

Q. And that is less than the amount shown in your column, the figures I just read, of \$3,461.87?

A. Yes; it is; but this does not include the time charges.

Q. Aren't there deductible expense items in those time charges?

(Testimony of Forrest P. Calkins.)

A. As I recall that exhibit—if I could see it, please—there was no breakdown that we could determine what was charges, what was interest and what was service charge.

Q. I believe you referred to plaintiff's Exhibit 19 in evidence, and that is the car on the GMAC record? A. Yes, sir.

Q. I want you to read the bottom line on plaintiff's Exhibit 19.

A. Bottom line, government's Exhibit 19 is boxed off, the first box being amount contract \$2,413.62, amount of check, zero, account \$2,051.75. Figure under that looks like 8-13 ter. amt. amount \$135 32-4-(5). N.R. Res-39 8-100 part cut off here looks like 3006; deal res 39-40 part disc. 34. [303] Finance charges 32-1, 157.41 inserted. Estimated value new. Equity pt. 1240; branch No. 74.

Q. Now, does that breakdown show anything to you, showing the finance charges, interest and other matters charged besides the initial cost of the automobile itself?

A. Yes, sir; it does. I would say that the little box listed "Finance Charge" looks like \$157.41. There is no breakdown on here, showing what is breakdown for interest for any period of time.

Q. Therefore, on the basis of that, inasmuch as you do have some interest already in evidence, could that figure appearing on line 1-K of the net worth method of \$3,146.87 have been reduced?

A. Could it be reduced?

Q. Yes.

(Testimony of Forrest P. Calkins.)

A. If we could determine a portion of that was actual interest and deductible; yes, sir.

Q. It could have been?

A. I would like to correct it. No; at that point it would not be deductible; no, sir.

Q. Why?

A. Because that is the over-all cost of that car. It is money he has invested in that car.

Q. Do I understand you to mean that interest is included in the cost of the car?

A. If the finance charges include interest; [304] yes.

Q. Referring to the computation of the net worth method on III-D-2, loss on trade-in on Buick of \$1,790.20. A. Yes, sir.

Q. Under the column, 12-31-49. A. Yes, sir.

Q. Why has this figure been added?

A. Because that was asset dropped out during the period 12-31-48 to 12-31-49.

Q. May I have your answer again?

A. I was still answering. The asset was dropped from the balance here between the end of 1948 and the end of 1949. The tax payer sustained that loss of that amount. It is deductible loss.

Q. Why?

A. It was a sale, or trade-in, which is substantially the same, of a personal automobile.

Q. Has there been any evidence adduced that you can recall that has definitely stated this to be an asset, personal item?

A. In a negative way, in that I have not heard

(Testimony of Forrest P. Calkins.)

any evidence that he used the car in his trade or business.

Q. Will you refer, once again, to the income tax return for 1948 on the Ace High Club? I believe that is plaintiff's Exhibit 2. Am I correct?

A. That is Exhibit 1.

Q. I refer you to the schedule under profit and loss statement in that return. [305]

A. Yes, sir.

Q. Under the heading of "Other Business Expenses," five items up from the bottom of that group, listed "Travel Expenses for Business."

A. Yes, sir.

Q. What is the amount of that travel expense?

A. \$882.25.

Q. Would that indicate to you that that car was used partly for business purposes?

A. I don't interpret it so, sir.

Q. But it could be?

A. It could be; yes. It could be for all types of travel, too.

Q. If it were, then what is the figure of \$1,790.20 appearing on computation of computation of net worth method on III-D-2; \$1,790.20, would that be loss?

Mr. Maxwell: Objected to as assuming something not in evidence.

Mr. Puccinelli: Your Honor please, we are trying to arrive at the basis of things, here.

Mr. Brown: The question was, if it were.

Mr. Puccinelli: It wasn't proven that it was not, and he said it could be.

(Testimony of Forrest P. Calkins.)

The Court: Objection overruled.

Q. Would that \$1,790.20 then be a loss?

A. It would be reduced proportionately between the use of the automobile for business and the use of the automobile for personal [306] or pleasure, if the car was used in a business way.

Q. And as so reduced, that would also reduce the tax liability for that year? Actually would reduce the net income? A. Yes, sir.

Q. Now, you recall, Mr. Calkins, that we were discussing the computation under deposit and expenditure method with reference to the net income in the return filed, being the amount of \$7,087.03 under 1948? A. Yes, sir.

Q. And you stated you made a \$670 mistake there? A. Yes, sir.

Q. Would that same mistake appear under the net worth method, or approximately the same amount? I refer you specifically to Item 14.

A. Yes; it would, because I carried the same figure.

Q. And would the error be for the same amount?

A. Yes, sir.

Q. Amount in favor of the government?

A. As to line 5?

Q. Yes. Do you have plaintiff's Exhibit 30 there, Mr. Calkins? Mr. Calkins, in your direct testimony, did you refer to some accounts payable?

A. Accounts of notes payable; yes, sir.

Q. At the beginning of your testimony, I believe

(Testimony of Forrest P. Calkins.)

you said there were some accounts payable in the records? A. Yes, sir. [307]

Q. And were you referring to those items appearing on plaintiff's Exhibit 30?

Mr. Maxwell: I suggest you show the witness the exhibit.

Q. In your reference to the two accounts payable, were you referring to the accounts payable appearing in that Exhibit 30, plaintiff's Exhibit 30?

A. Yes, sir; I think I was.

Q. Is there an accounts payable column in this record?

A. Accounts payable column; yes, sir.

Q. Will you read the amount? Will you read the whole item, as a matter of fact, that is on that line of that column?

A. January 8, City of Rangely, check 122, 1-8 deposited, \$400.30. Credit \$650 spread over to accounts payable; \$325 carried over to taxes, license, insurance, charge \$325.

Q. I take it then there was an entry in your record of the accounts payable paid by check in that amount of \$325, which you just read?

A. Yes, sir.

Q. Then was that taken into consideration in your computation? A. That particular item?

Q. Yes. Any and all other similar assets, if there was any?

Mr. Maxwell: May the witness look over the record to find out if there was?

(Testimony of Forrest P. Calkins.)

Mr. Puccinelli: Yes; I refer you to the very next page under the column, the same column, headed "Accounts Payable." [308] Are there any items appearing there?

A. Item \$16.32; Item \$182.56.

Q. Are those paid by check, as reflected by those records? A. Yes, sir; they were.

Q. I can repeat the question, if you want to go through the rest of the records to see if there are any other accounts payable paid by check.

A. If I may answer in this way, sir—if they were paid by check and cleared the bank, they were taken into account; yes.

Q. How; that is what I want to know.

A. Through my computations on schedules E and F, computing the bank withdrawals. I took into consideration all withdrawals from the bank. There wasn't a complete and accurate record of all checks. No charges against that account have been taken into consideration.

Mr. Maxwell: By this you mean Exhibit 30?

A. Yes, sir.

Q. Does the fact that payments by check on accounts payable had been made, have anything to do with your arriving at your thought that the books were kept on a cash basis?

A. I gave thought to it. It was apparent to me that the books were actually, and returns actually were, prepared on a cash basis.

Q. I have just one question with reference to plaintiff's Exhibit 35, which is computation of tax on the expenditure method. Just one question and

(Testimony of Forrest P. Calkins.)

only one in passing the exhibit to the jury. [309]

Mr. Maxwell: Perfectly all right.

Q. Mr. Calkins, in computing the tax, as reflected by your computation of tax for the year 1948, did you take into consideration the operating loss for the year 1947 and carry it forward to 1948?

Mr. Maxwell: I will object on the ground that that certainly assumes something that is not in evidence. In any event, it is immaterial, and irrelevant and has nothing to do with the issues before this court.

The Court: The answer is yes or no. The witness may answer.

A. Would you read that back please?

(Question read.)

A. No, sir, I did not.

Mr. Puccinelli: That is all.

Redirect Examination

By Mr. Maxwell:

Q. You were questioned, sir, about that automobile cost and the amount of interest. I will show you Defendant's Exhibit B, and Defendant's Exhibit B shows the total price for the automobile, is that correct? A. Yes, sir.

Q. And what is that amount shown on that exhibit? A. Total price \$3,461.87.

Q. Is that the same thing as shown in your computation on net worth?

(Testimony of Forrest P. Calkins.)

A. Yes, sir, it is. [310]

Q. Now does that set out the amount what Defendant's Exhibit B sets out, the amount of monthly payments?

A. Yes, sir.

Q. How much was that? A. \$134.09.

Q. Does it show in Defendant's Exhibit B what amount of interest is included in the monthly payment?

A. No, sir, it does not.

Q. In 1949, what was the law with respect to payments on time contracts?

Mr. Puccinelli: I think——

Mr. Maxwell: I will withdraw that and reframe the question.

Q. In 1949 was a deduction permitted for a portion of the payment on a time contract, where no segregation was made between interest and the finance charges and principal?

A. No.

Mr. Puccinelli: I think I have the same objection, testifying as to the law.

The Court: I assume he only testified as to what his practice was in connection with that situation.

Mr. Maxwell: Yes, your Honor.

The Court: That is the thought we are trying to get over. Objection overruled.

Q. Was any deduction allowed?

A. No, sir. [311]

Q. Now on your net worth schedule, I will refer you to item I-G, Ace High Club, in amount of \$66,500?

A. Yes, sir.

Q. That is the same figure at the beginning of 1948, the end of 1948 and the end of 1949, is it not?

(Testimony of Forrest P. Calkins.)

A. Yes, sir, it is.

Q. Would it make any difference in your computations if you used the figure shown on the return on the depreciation schedule of \$68,945.28?

A. Not if it carried through all years.

Q. Does depreciation schedule carry amount for loss on the return for 1948?

A. No, sir, it does not.

Q. Do you remember Mr. Rosa's testimony, as to whether just buildings and equipment were sold to Mr. Percifield, or was it land, buildings and equipment?

A. It was land, building and equipment.

Q. And does your item here, \$66,500, also include land? A. Yes, sir, it does.

Q. Is land depreciable? A. No, sir.

Q. Can I claim a deduction for depreciation on land? A. No, sir, you can not.

Mr. Maxwell: I think that is all. [312]

Recross-Examination

By Mr. Puccinelli:

Q. You heard the testimony, I think, in regard to the type of town Rangely was? A. Yes.

Q. And how in 1945 it was very very small, if I correctly recall?

Mr. Maxwell: Objected to as not within the scope, not bearing on what the witness testified to.

The Court: Objection sustained. This witness is

(Testimony of Forrest P. Calkins.)

not qualified to testify as to Rangely, or any other town, as a matter of fact.

Q. You did, however, Mr. Calkins, use a different figure in your computation on depreciation schedule than the depreciation schedule appearing in the income tax returns?

Mr. Maxwell: Your Honor, the testimony has been quite the contrary.

Mr. Puccinelli: It has?

Q. You used \$66,500, did you not?

A. I made no computation on depreciation, sir.

Q. I mean in using that figure.

A. The asset column.

Q. And the figure as used in the income tax return is more than \$66,500?

A. Yes, sir, it is.

Mr. Puccinelli: That is all. [313]

Redirect Examination

By Mr. Maxwell:

Well, may it please the Court, I have two questions.

Q. Would it make any difference on your net worth figure what figure you used?

Mr. Puccinelli: Objected to as asked and answered.

The Court: Objection overruled.

A. No, sir. It would make no difference what amount is used, so far as the increase or decrease of net worth.

(Testimony of Forrest P. Calkins.)

Q. Or as far as computation of income?

A. Yes, sir.

Mr. Maxwell: That is all.

(Witness excused.)

The Court: Any further witnesses?

Mr. Brown: The government rests.

Mr. Puccinelli: I would like the record to show that I collected the computations from the jury.

Mr. Maxwell: May the computations be given to the clerk, in case they may be needed at some future date.

The Court: Yes, Mr. Clerk, will you take possession of these computations.

(Jury admonished and recess taken at 4:30 p.m. until Monday morning.) [314]

February 20, 1956—10:00 A.M.

The Court: Let the record show the presence of the defendant in court with counsel and the presence of counsel for the government. The record will show that the Court, being advised by defendant's counsel that they propose to make a motion for acquittal under Rule 29 at this time, the Court has been convened without the jury being present.

(Motion for acquittal argued.)

The Court: The defendant's motion for, acquittal, made under Rule 29, is denied.

11:20 A.M.

(Defendant present in court with counsel and government counsel present. Presence of the jury stipulated, with exception of juror Mrs. Maude Taylor, who was absent due to death in the family. Alternate juror took place in jury box of Mrs. Taylor, on stipulation of counsel.)

The Court: I believe that as of the time of adjournment Friday last, the government had rested its case and the defendant had asked for a recess at that time that it might prepare its case. Are you ready to proceed, gentlemen?

Mr. Puccinelli: Your Honor please, the defense rests.

Mr. Anderson: I don't know whether it is necessary [315] or not, may it please the Court, we would like the record to show any motion necessary at the close of all the evidence. We would like to show that.

The Court: The record shows that defendant's counsel made and argued a motion for acquittal this morning, which, after argument, by defendant's counsel and government's counsel, was denied by the Court. The defendant's counsel has elected not to put on any evidence and you requested now, as I understand it, Mr. Anderson, that you desire for the record now to have your motion for acquittal renewed.

Mr. Anderson: Yes, your Honor.

Mr. Brown: We move that this matter be considered out of the presence of the jury, your Honor.

The Court: Well, there is no further matter, I can see. It is all over. The Court makes the same ruling as before the recess. Now defendant's counsel have asked for further time for the purpose of preparing instructions and I think we should recess for that purpose.

(Jury admonished and recess taken at 11:30 until 2:00 p.m.)

February 20, 1956—2:00 P.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.) [316]

(Jury admonished and recess taken until 11:00 o'clock February 21, 1956, for further preparation of instructions.)

February 21, 1956—10:00 A.M.

(Defendant present with counsel and government counsel present.)

The Court: Gentlemen, it is understood that we would meet for a few minutes prior to the calling in of the jury, to the end that the Court might pass upon the offered instructions on the part of the government and on the part of the defendant. The Court has prepared a written statement, which sets out its disposition of the plaintiff's instructions being offered and which are numbered from 1 to 36, and has also stated its disposition of defendant's instructions, lettered A to and including G. Respective counsel have been furnished with copies of the

original, which will be filed at this time. Do you stipulate, gentlemen, that this is sufficient disposition of this particular phase of the case?

Mr. Brown: The government so stipulates, your Honor.

Mr. Anderson: Yes, I think we stipulate also, according to the understanding we had in chambers.

The Court: Let the record further show that these matters which we are now disposing of in open court were discussed at some length in chambers, [317] as counsel has said. The jury will be called in and counsel will proceed with their arguments. After the arguments, the instructions which have been settled by the Court will then be read and the jury will then be excused momentarily to permit counsel to make final objections to the instructions as read. It may be stated here for the record that all of the instructions proposed to be given by the Court have been discussed at length in chambers and the Court now has the benefit of tentative objections and exceptions of counsel to the instructions settled by the Court. Then, as stated by the Court, the record will be made after the instructions have been read.

11:00 A.M.

(Presence of the jury stipulated.)

(Argument by respective counsel.)

(Jury admonished and recess taken at 1:10 until 2:30 p.m.)

February 21, 1956—2:30 P.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.)

The Court: You may say for the record, Mrs. Reporter, that the instructions approved and to be [318] given by the Court are numbers 1 to 58, inclusive, and for the benefit of counsel and the record, we will show that Instructions 18, 36 and 41, as they were originally numbered, have been withdrawn, so those numbers will not be read and for the purpose of permitting counsel to follow, I will read the numbers of the instructions as we go along. [319]

INSTRUCTIONS TO THE JURY

No. 1.

Ladies and Gentlemen of the Jury:

You have heard the testimony of the witnesses, and you have heard the arguments of counsel. It is now my duty to instruct you as to the legal principles which enter the case.

You are the judges of the facts, and that includes the determination by you of the guilt or innocence of the defendant. Where the evidence is conflicting, it is your duty to resolve that conflict and determine what is the truth.

In the performance by you of your duty as judges of the facts, you are not to act arbitrarily. As ours is a government of laws and not of men, you are

governed by rules of law. It is my duty as Judge of this Court to announce these rules of law to you, and it is your duty as jurors to apply the law. You must base your determination of what the facts are upon the evidence introduced in the trial and upon the evidence alone. [320]

No. 2.

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system courts and jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct those mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass on what the facts of the case are, upon the creditibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just as little inclined to interfere with the province of the jury passing upon the facts of the case, as it is sensitive of having the jury undertake to determine what is the law of the case. With this understanding of our respective duties, the

Court states to you the following general principles. [321]

No. 3

The information itself is a mere charge or accusation against the defendant, and is not of itself any evidence of his guilt, and no juror in this case shall permit himself or herself to be to any extent influenced against the defendant because of or an account of the information. [322]

No. 4

The information in this case charges a violation of Section 145(b) of Title 26, United States Code, which so far as it applies here reads “* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter * * * shall * * * be guilty” of an offense. [323]

Nos. 5 and 6

The information charges the defendant with two offenses or counts as follows:

Count 1: That on or about the 15th day of March, 1949, in the District of Nevada, Raymond Percifield, late of Rangely, Colorado, who during the calendar year of 1948 was married to Mossie Percifield, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue District of Nevada at Reno, Nevada, false and fraudulent joint

income tax returns on behalf of himself and his said wife, wherein it was stated in total that their net income for said calendar year was nil and that they had suffered a net loss for said calendar year of \$6,415.71, and that the amount of tax due and owing thereon was nil, whereas he then and there well knew their joint income for the said calendar year was the sum of \$13,637.78, upon which this joint income there was owing to the United States of America an income tax of \$2,041.92.

Count 2: That on or about the 15th day of March, 1950, in the District of Nevada, Raymond Percifield, late of Rangely, Colorado, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by [324] filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return, where in he stated that this net income for said calendar year was nil, that he had suffered a total net loss of \$3,923.07 for said calendar year and that the amount of tax due and owing thereon was nil, whereas he then and there well knew his net income for the said calendar year was the sum of \$6,372.02, upon which said net income he owed to the United States of America an income tax of \$559.76. [325]

No. 7

To the two charges or counts set forth in the information the defendant, upon his arraignment,

pleaded "not guilty" to each count, thus putting in issue every material allegation contained in each of the two counts in the information, and it therefore becomes necessary for the prosecution to establish each and every one and all such allegations beyond all reasonable doubt. [326]

No. 8

Every person required to pay income taxes is under a personal duty to call, or cause to be filed, for him a proper income tax return. Bona fide mistakes should not be treated as false or fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of good faith as to the correctness of the statement which he signs, whether prepared by him or somebody else. [327 to 329]

No. 9

The defendant has been charged under a statute which applies to "any person who wilfully attempts in any manner to evade or defeat any tax imposed," etc. With respect to the meaning of the phrase "in any manner," I charge that Congress did not define or limit the methods by which a wilful attempt to evade and defeat might be accomplished. The information in this case charges attempt to evade taxes by filing false income tax returns. In the event that you determine that the income tax returns for 1948 or 1949, or either of them understated the incomes of the defendant, or his wife,

you must then determine if such understatement was wilful. [329]

No. 10

You are instructed that the defendant is presumed to be innocent and that the presumption of innocence attends him to the end of the trial, or until the verdict is reached, and will prevail, unless it is overcome by evidence which convinces the jury beyond a reasonable doubt of his guilt. [330]

No. 11

You are instructed that the rule of law which throws around the defendant the presumption of innocence and requires the government to establish, beyond a reasonable doubt, every material fact averred in the information, is not intended to shield those who are actually guilty from just and merited punishment, but it is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime. [331]

No. 12

A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charges in a count of the information, there is not

a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation. [332]

No. 13

You are to consider only the evidence introduced in this case. A conviction is justified only when such evidence excludes all reasonable doubt, as the same has been defined to you, without it being restated or repeated. You are to understand that the requirements that a defendant's guilt be shown beyond a reasonable doubt should be considered in connection with and as accompanying all the instructions that are given to you. [332-A]

No. 14

To establish its case the government must prove both of the following elements: (1) That substantial income tax was due and owing from the defendant in addition declared in his original income tax returns for the years 1948 and 1948; and (2) that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in each count of the information is a wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt" as used in this law, involves two elements: (1) an intent to evade or defeat the tax, and (2) some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and

understanding that during each of the calendar years 1948 and 1949 he had an income in each of such years which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar years and which he knew it was his duty to state in his returns for each of such years.

There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the taxes. The one alleged in this information is that of the filing false, fraudulent returns with intent to defeat the tax liabilities. The [333] gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the government. The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant. [334]

No. 15

You are instructed that an attempt to evade income tax for one year is a separate offense from an attempt to evade for a different year. The information in this case, therefore, charges two separate offenses, the attempt to evade for the year 1948 and the attempt to evade for the year 1949. You may

find the defendant guilty or not guilty on either or both counts. [335]

No. 16

The Court instructs the jury that in every crime or public offense there must exist a union or joint operation of act and intention.

Intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused. [336]

No. 17

If you find that a fraudulent return is filed with intent to defeat a part or all of the tax, and that this was done wilfully, the crime is complete as soon as the crime takes place. [337]

No. 19

Wilfully means knowingly, and with a bad heart, and with a bad intent; it means having the purpose to cheat or defraud or doing wrong in connection with a tax matter. It is not enough if all that is shown is that a defendant was stubborn or stupid, careless, or negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books, or if he makes errors of law, or if he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury, or if he acts without the advice of a lawyer or accountant. [338]

No. 20

In a prosecution for evasion of federal income taxes, the taxpayer's wilfullness is an element necessary for conviction; such wilfullness involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income, however, such understatement of income, if any, should be viewed with all other acts of the defendant and the surrounding circumstances, and when so viewed wilfullness may be inferred from a combination of the acts and circumstances, although each separate act and circumstance, standing alone, may be inconclusive on the question of wilfullness. [339]

No. 21

The first step in arriving at the income of an individual upon which the tax is imposed is a determination of the gross income of the individual. Gross income is generally all gains or profits and income derived from any source whatever, whether from salaries or wages, from gambling, professions, trades, and businesses, from sales, from dividends, from interest, or from the transactions of any business carried on for gain or profit, except that from such gains and profits there must be excluded under the provisions of the Revenue Acts certain items which would properly be a part of gross income if the statute did not require their exclusion. These items are not pertinent in this case.

After having determined the gross income of an

individual, the next step provided by the statutes for arriving at the income upon which the tax is computed is to deduct, from the so-called gross income such deductions as the statutes permit; that is, an individual is permitted to deduct from gross income all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

After such of these deductions from gross income as the individual is entitled to are made, the amount remaining is the adjusted gross income. In determining net income the taxpayer is permitted to deduct from adjusted gross income either the optional standard deductions fixed by law or the amount paid [340] by him during the year for certain charitable contributions, interest, taxes, medical expenses, casualty losses, and other miscellaneous personal deductions. [341]

No. 22

If you find that there were any gains, profits, or income received by the defendant which were not reported, it makes no difference, as far as the question of taxability is concerned, whether such income was lawfully received or unlawfully received, inasmuch as both were taxable and should have been reported. [342]

No. 23

The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money

may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income. [343]

No. 24

It is not necessary that the government prove an evasion of all the tax charged. It is sufficient if any substantial portion of the tax was attempted to be defeated and evaded as charged in that count. [344]

No. 25

To prove that the defendant's return understated his correct income, the government relies upon the bank deposit method. The theory of this method is that if a taxpayer is engaged in an income producing business or calling, and is constantly day by day and month by month depositing money in bank accounts in his name or in accounts under his domination or control, and such deposits do not represent redeposits or transfers and are not attributable to gifts, inheritances or other non-taxable sources, then such deposits represent income; and if the total of such deposits in a given year exceed exemptions and deductions, that income is taxable. The government claims that after eliminating deposits of funds from non-taxable sources, such as gifts, inheritances, prior accumulations, non-taxable proceeds from the liquidation of capital assets, redeposit of withdrawals, and transfers from one account to another, the total of the remaining deposits which in a given

year exceed exemptions and deductions represents the defendant's correct taxable income for that year, the amount he should have reported in his income tax return.

In order to prove that an additional tax is owing, the government must prove beyond a reasonable doubt; (1) that the total bank account, after the elimination of the non-taxable items and allowance of the exemptions and deductions I have previously mentioned, substantially exceed reported income for each year referred to in the information; and (2) that such deposits [345] constitute income to the defendant.

If you find in any year or years that the government has not established that the total bank deposits after the prescribed eliminations and deductions are substantially in excess of the income reported by the defendant in his return for that year, or you have a reasonable doubt that such deposits exceed reported income for that year, you will return a verdict of not guilty as to such count or counts of the information. If you find, on the other hand, beyond a reasonable doubt that such deposits exceed income reported in defendant's tax return for such year or years, you will proceed to inquire whether the government has established that those deposits represented taxable income on which the defendant wilfully attempted to evade or defeat the tax. In this connection, the government must establish beyond a reasonable doubt that the defendant was engaged in an income producing business or activity and that he realized income from such business dur-

ing the period in question in excess of that reported. It is not sufficient that the evidence simply establish excess deposits during the period involved, but it must be shown beyond a reasonable doubt that such excess deposits were made from funds realized as income through an income producing business or activity.

If you find that the bank deposits have been made constantly day by day, week by week or month by month, there would arise the inference that such deposits are consistent with the orderly business practice of depositing current receipts. [346] In other words, if a taxpayer has a business or calling of a remunerative nature and during the taxable years involved he made regular periodic deposits of money in his bank accounts, then there is evidence that he has had income during those years and if the net annual total of such deposits exceeds exemptions and deductions, the balance represents taxable income. [347]

No. 26

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the methods of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

The government is authorized by law, if the books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has been undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

If, at the end of a year, a man owns more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by gift or inheritance or loan, it may be inferred that it was part of taxable income. [348]

No. 27

The government has placed before you evidence relating to the net worth of Raymond and Mossie Percifield at the end of each of the years 1947 to 1949, inclusive. A defendant's net worth for a given year is the difference between his assets and liabilities, and increase in net worth for a year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute a defendant's taxable net income by the net worth method, you should subtract from the increase in net worth for any given year any non-taxable funds received during the year and then add the defendant's non-deductible expenditures for that year which would, of course, include his living expenses and the income taxes paid during the year. These expenditures are added in order to compute net income because they

are not represented in the assets which the defendant has accumulated during the year and they are nondeductible expenses. If you find that the defendant had an increase in net worth for the years 1948 or 1949, and also had a business or calling of a lucrative nature, there is evidence that the defendant had net income for that year and if the amount exceeds exemptions and deductions, then that income is taxable. [349]

No. 28

Every person, except wage earners and farmers, liable to pay income tax is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits, and other matters required to be shown in any income tax return. [350]

No. 29

As previously stated to you, the income tax law provides that the net income of the taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. In this case two methods of recording transactions in books of accounts have been referred to, one referred to as the cash method and the other as the accrual method. Under the cash method income is recorded as of the time it is actually received and expenses are included only when actually paid. Under the accrual method of recording transactions income is set up when the right to receive the money arises and expenses are set up at the time the liability is incurred. [351]

No. 30

Where a taxpayer's records are inadequate or inaccurate in substantial respect, it is proper to determine taxable income (1) by the net worth and expenditures method, (2) or by the bank deposits and cash expenditures method, (3) or both.

Of course, the government does not have to prove the exact amounts of unreported income. To require a meticulous degree of proof in a case of the present sort would be tantamount to holding that skillful concealment is an invincible barrier to proof. [352]

No. 31

The question of intent is a matter for you, as jurors, to determine and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent of the defendant was at the time in question. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inference may arise from a combination of acts, although each act standing by itself may be unimportant. These are questions of fact to be determined from all the circumstances. [353]

No. 32

In determining what the defendant's intent was, you may take into consideration any evidence you find of the concealment of tax by the defendant.

No. 33

On the question of intent to evade income taxes, there are certain matters which you may consider as pointing to intent if you find that they exist in this case. These are general illustrations: making false entries in the books, destruction of books, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, and any conduct the likelihood of which would be to mislead or conceal. I give you these instances simply to illustrate the type of conduct from which you may infer intent to evade taxes. And if the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose. [355]

No. 34

You may find evidence of an intent to commit the crime of attempting to evade and defeat the payment of a tax, even though there is coupled with that intent the desire to suppress information as to acts which are criminal in other ways. Thus, even if you should find that the defendant desired to conceal his receipts of money from any one, you may also find in addition to such motive the existence of an intent to defraud the United States of monies

due as income taxes and to attempt to defeat or evade such taxes. [356]

No. 35

You are instructed that the defendant in this case is being tried upon the charges named in the information and no other charges. If you suspect or believe from the evidence that some offense or misconduct or crime not mentioned in the information was committed by the defendant, but so believing, you nevertheless entertain a reasonable doubt as to whether such defendant committed the particular offense charged against him in the information herein, you will resolve that doubt in favor of the defendant and return a verdict of "not guilty."

No. 37

You are instructed that in determining what a defendant's intent was at the time he filed his income tax returns, you may take into consideration, if you find it to be the fact, that such defendant made false and contradictory statements on material matters to the examining officers of the Bureau of Internal Revenue during the course of the investigation. [358]

No. 38

In this case you are instructed that you should not infer evil motive because of the failure of the defendant, if any, to make a full and complete disclosure to the government agents when asked as to his financial transactions; however, you may consider such failure, if you find any, together with all

other acts and circumstances in determining the intent of the defendant. [359]

No. 39

You are instructed that the filing of a return by defendant which underestimates his true income is unlawful only if made wilfully, with knowledge of its falseness and with intent to evade income taxes and there is no presumption that may be drawn from the act itself, and both knowledge and wilfulness must be established by independent proof direct or circumstantial. [360]

No. 41

In offering proof that the defendant attempted to defeat and evade income taxes by filing false returns, the government is not limited to a single mode of proof. In the present case the government has sought to show that the defendant has substantial unreported income (1) by the bank deposits and cash expenditures method and (2) also by the net worth and cash expenditures method. It is for you to determine whether the government has proven fraud but for the government to prevail on this issue it is not necessary that it establish fraud by both methods. It is sufficient to establish that part of the government's case, if you find that fraud has been proved by either method. [361]

No. 42

There have been admitted in evidence certain exhibits variously referred to as schedules or sum-

maries. Strictly speaking, these exhibits are not actually evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded it is the books, records and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For that purpose you are entitled to consider them. [362]

No. 43

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound. [363]

No. 44

You have heard expert testimony relating to the issues involved in this case. I charge you that the computations made by an expert are for the convenience of both sides in presenting the case for your consideration. You are not bound by the computations or other testimony of an expert witness, but you should give such testimony the weight to which you determine it is entitled in the light of the other proof in the case and also with reference to your conclusions as to whether or not the facts, on which the particular expert's testimony was based, have been established by the necessary degree of proof. [364]

No. 45

Evidence is of two kinds, direct and circumstantial. Direct evidence is that evidence which is given when a witness testifies directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances from which this jury may infer other and connecting facts, which usually and reasonably follow. Crimes may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence taken as a whole must be consistent with each other, and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant's innocence.

In the case of circumstantial evidence it is not necessary that the proof shall be conclusive. It is

sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubt in their minds as to his guilt. If the jury believe the facts as shown by the evidence in this case, as to either count, are all consistent with the supposition that the defendant is guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty of that count; but if the jury do not so believe, they should find the defendant not guilty of that count. All that can be required is not absolute and positive proof, but such proof as convinces the jury that the [365] crime has been made out against the accused beyond a reasonable doubt.

No. 46

A person charged with an offense against the laws of the United States shall, at his own request but not otherwise, be a competent witness. His failure to make such request and to testify as a witness shall not create any presumption against him; and no juror in this case should permit himself or herself to be to any extent influenced against the defendant because of, or on account of, his failure to testify as a witness in the case. [366]

No. 47

You are the sole judges of the credibility and the weight which is to be given to the testimony of the different witnesses who have testified upon this

trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of a witness' testimony, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the government or the defendant, the manner in which he might be effected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If the jury believe that any witness has wilfully sworn falsely as to any material fact in the case, they may disregard the whole of the evidence of any such witness, except insofar as it is corroborated by other credible evidence.

No. 48

You are instructed that evidence of oral admissions, if any, of the defendant ought to be received with caution. [367]

No. 49

You are instructed, that some evidence has been received as to the character of the defendant. You

will give to this evidence of good character such weight as you think it is entitled to receive and if after a consideration of all the evidence, facts, and circumstances in the case, including the evidence of good character, you have a reasonable doubt as to whether the defendant is guilty or innocent, then it will be your duty to find the defendant not guilty.

No. 50

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your minds as against the declarations of a lesser number or a presumption or other evidence, which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. [368]

No. 51

The Court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their agreements, or presentations as to what facts have been or are to be proved. And if there is a variance be-

tween the two, you must, in arriving at your verdict—to the extent that there is such variance—consider only the facts testified to by the witnesses. You will remember at all times that statements of counsel in their arguments or presentations are not evidence in the case. If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are. [369]

No. 52

At times throughout the trial the Court has been called upon to rule upon certain motions, including the motion of defendant for a judgment of acquittal, and to pass upon whether or not certain offered evidence might be properly admitted. With such rulings and the reasons for them you are not concerned. Whether motions should be granted or denied, and whether the offered evidence is admissible or inadmissible, are purely questions of law, and from a ruling on such questions you are not to draw any inference nor are you to draw any inference as to what weight should be given the evidence or as to the credibility of a witness. In admitting evidence, to which an objection is made, the Court does not determine what weight should be given such evidence. As to any offer of evidence that was rejected by the Court, you, of course, must not consider the same. As to any question to which an objection was sustained, you must not conjecture as

to what the answer might have been or as to the reason for the objection.

Evidence stricken by the Court must be entirely disregarded by you, and you must treat such evidence as if you had never heard or seen it. [370]

No. 53

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it. [371]

No. 54

Some of the principles of law may be repeated more than once. It is my endeavor to illustrate clearly to you different phases of this case. It may be necessary to repeat some portions of these instructions at different times and in different places. You are not, however, to consider these principles of law which may be repeated more than once of any greater importance or of any more binding force upon you than those which are stated only once.

All these instructions are to be considered together. You must not take one instruction and base your verdict upon that instruction alone, you must not take one single sentence and fix your verdict upon that sentence alone, but you are to consider all these instructions as a single charge to you, give the force and effect to every word and every sentence and every instruction. [372]

No. 55

The matter of sympathy is not to enter into your deliberations. Every man who commits a crime is in one sense unfortunate. He is to be pitied, and those who are to share his suffering, and who are innocent, are also to be pitied; but that is one of the almost universal attendants and consequences of crime. Few persons can commit a crime unless some innocent person suffers in consequence. Your sole duty and my sole duty, under our oaths, is to ascertain and determine what the truth is. You are to determine whether a crime has been committed, and whether the evidence offered upon this witness stand satisfied you of the guilt of the defendant beyond a reasonable doubt.

No. 56

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so after a consideration of the case with your fellow jurors, and you should

not hesitate to change an opinion once convinced that it is erroneous. However, you should not be influenced in any way on any questions submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the guilt or innocence of the defendant for the mere purpose of returning a verdict or solely because of the opinion of the [373] other jurors.

No. 57

The duty of counsel and of the Court has now been performed. Counsel have brought to your consideration all the facts and evidence within their reach, which, in their judgment, will assist you in determining the truth. The Court has endeavored to advise and correctly instruct you as to the law, and it now remains for you to perform the last and the most important duty in this trial, to determine the issue of guilt or innocence; and it is with the utmost confidence that I submit this case to you, believing that you will not permit your judgment to be unduly influenced by sympathy, sentiment, or prejudice; that you will consider the law as given to you by the Court, and the evidence introduced during this trial.

The liberty of the defendant is sacred; it cannot be lightly taken away. You cannot bring in a verdict of guilty until the guilt of the accused is proven by the evidence in the case beyond a reasonable doubt. The interests of the government are also im-

portant; its laws are made to be obeyed, and if broken they should be vindicated, and if, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should bring in your verdict accordingly. You must be just to the defendant; you must also be just to the government. Duty demands it, the law [374] demands it, and your oath demands it. As upright men and women, as honest jurors, you are now charged with one of the most solemn and responsible duties of an American citizen, and I trust that you will perform it with an eye to your duty, to your oath, to the law as given you by the Court, and to the evidence in the case.

No. 58

It takes twelve to find a verdict. The clerk, as a matter of convenience, has prepared forms of verdict which will be handed to you.

If you find the defendant guilty of any of said offenses charged in the information, you will insert the word "is" in the blank space before the word "guilty"; if you find the defendant not guilty of any of said charges, you will insert the word "not" in the blank space before the word "guilty." In arriving at your verdicts, you may find the defendant not guilty on both counts or guilty on both counts, not guilty on one count and guilty on the other count, or you may reach a verdict on one count and fail to reach a verdict on the other count.

Upon retiring to your jury room you will select

one of your number to act as your foreman or forelady, and it will be the duty of the one you will select to serve as your spokesman in any further proceedings in this Court.

If it should become necessary for you to communicate with the Court or any matters connected with the case while you are deliberating you should do so through the marshal. Should [375] you desire any of the exhibits introduced in evidence, advise the marshal of that fact and the exhibits you wish to see will be delivered to you in the jury room. I admonish you that during the course of your deliberations you must not disclose to any one, including the Court, how you stand numerically or otherwise upon the questions of the guilt or innocence of the defendant and this admonition you should adhere to until you, as a jury, have reached a verdict. [376]

In Chambers—3:55 P.M.

Defendant present and defendant's counsel and government counsel present.

The Court: Let the record show that, pursuant to statement made in open court, we are meeting in chambers for the purpose of receiving counsels' objections to the instructions as given by the Court to the jury. Let the record show the presence of the defendant and his counsel and counsel for the government, and that the record is being made outside the presence of the jury.

Now, gentlemen, I think we will start with the plaintiff's case, and you can numerically make such objections as you see fit for the record.

Mr. Maxwell: Your Honor please, we accept the instructions as given and we wish to interpose no objections to the instructions as given.

The Court: Let the record so show. Now counsel for the defendant, you make any objections you have is the record as to your instructions, which are 7 in number and labeled A to G. We might let the record show that plaintiff's offered instructions were numbered 1 to 32, inclusive. You may proceed. [377]

Mr. Puccinelli: May it please the Court, we except to the Court's refusal to give defendant's requested instruction B, as it is a correct statement of the law and is not covered by any other instruction given by the Court.

Defendant's Requested Instruction B

You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the defendant on a given date, followed by proof of a greater worth on a later date, does not mean that the difference between the amounts is income.

We except to the Court's refusal to give defendant's requested Instruction C, as it is a correct statement of the law and is not covered by any other instruction of the Court.

Defendant's Requested Instruction C

Ladies and gentlemen of the jury, it is my duty to say to you that the conclusion reached from experience that while the dangers which necessarily

accompany the use of the net worth theory do not foreclose its use, they do require on the part of the Court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth [378] cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows—take all of the assets of the taxpayer on a given date, which would include all tangible property, cash on hand or in bank account, securities, and accounts receivable, from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of assets and liabilities and deduct the result thereof from the net worth of the beginning of the period, and the difference could be income but there may be sources which increase net worth that are not taxable and would not be considered income.

We except to Instruction No. 8 as given, because it is not the law it is argumentative and uncertain and irrelevant.

We except to Instruction No. 14, because it is indefinite, misleading and lays down a rule that per-

mits the conviction of the defendant for a felony under Section 145(b) on evidence [379] proving, or tending to prove a misdemeanor under Section 145(a).

We except to Instruction No. 17, because it would permit the conviction of the defendant under Section 145(b) on proof of violation of Section 145(a), and does not require the wilful attempt to evade taxes to be proved by independent evidence.

We except to Instruction No. 20, as it acts to modify defendant's requested Instruction D, in that the modification nullifies the request and by the modification the independent evidence to prove the wilfullness in the request is nullified. In other words, it does not require independent proof of wilfullness.

We except to Instruction No. 26, because it is not a correct statement of the law and is indefinite, confusing and misleading.

We except to Instruction No. 27, because it is not a correct statement of the law, and is indefinite, uncertain and misleading.

We except to Instruction No. 29, because it is not a correct statement of the law and is not adjusted to the evidence in this case and the government proceeded in this case under a hybrid method, and therefore is confusing and misleading.

We except to Instruction No. 37 because it is not adjusted to the evidence in this case, it is misleading and allows the jury to convict on evidence establishing nothing more than a [380] misdemeanor, and is in conflict with other instructions requiring

proof by independent evidence of wilfullness and in conflict with Instruction No. 38.

We except to Instruction No. 38 because it tends to modify defendant's requested Instruction E, since it in effect destroys the full force and effect of the request, and is not adjusted to the evidence in this case as presented, as modified, and is confusing and misleading.

Defendant's Requested Instruction E

In this case you are instructed that you cannot infer evil motive because of the failure of the defendant to make a full and complete disclosure to the government agents when asked as to his financial transactions.

We except to Instruction No. 39, as it modifies defendant's requested Instruction F, since it eliminates therein phrases and words in the law as are contained in defendant's requested Instruction F.

Defendant's Requested Instruction F

You are instructed that the filing of a return by defendant which understates his true income is unlawful only if made wilfully, with knowledge of its falseness and with intent to evade income taxes, and there is no presumption that may be drawn from the act itself, and both knowledge and wilfulness must be established by independent proof.

We except to Instruction No. 19 as given and as modifying defendant's requested Instruction G, as defendant's request correctly stated the law and by

modifying it, renders it conflicting and confusing and indefinite and the modification destroys the force and effect of the request.

Defendant's Requested Instruction G

Wilfully means knowingly, with a bad heart and a bad intent. It means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid or careless, negligent or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He certainly is not wilful if he acts without the advice of a lawyer or accountant, for there is not requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.

The Court: Gentlemen, do you stipulate that the proceedings had here and now have the same force and effect as though had in open court?

Mr. Maxwell: So stipulated.

Mr. Puccinelli: So stipulated.

The Court: Let the record show all exceptions denied.

(Jury retired at 4:07 p.m.) [383]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this Court, or true and correct copies of orders entered on the minutes or dockets of this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of April, 1956.

[Seal] /s/ OLIVER F. PRATT,
Clerk.

[Endorsed]: No. 15119. United States Court of Appeals for the Ninth Circuit. Raymond Percifield, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: April 27, 1956.

Docketed: May 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 15119

RAYMOND PERCIFIELD,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Respondent.

CONCISE STATEMENT OF POINTS

I.

Errors in law occurring upon the trial being prejudicial to the Defendant and Appellant herein, a designation of the errors being, as follows:

(a) Erroneous instructions given to the jury.

(b) Instructions given to the jury taken together gave an incomplete and erroneous statement of the law of the case.

(c) Court's refusal to give requested Defendant's instructions to the jury constituted prejudicial error.

(d) The order of Court made in admitting as evidence Government's Exhibit 32 was erroneous.

(e) The Court made errors in ruling prejudicial to Defendant relating to admission of evidence during testimony of witness, Eleanor Jones, Transcript, Pages 108 through 163.

(f) The Court erred in denying Defendant's motion for directed Verdict and acquittal.

(g) The Court erred in denying Defendant's motion for new trial.

II.

Upon all exhibits received in evidence and upon all evidence adduced by the Government with relation to Defendant's income for the taxable periods covered by the Complaint after allowance of all legal deductions to the Defendant, there is insufficient evidence to establish:

(a) That Defendant received more reportable income than was reported on his returns; or

(b) That any tax deficiency existed; or

(c) Support the Judgment of Conviction.

III.

The expert opinion of the Government's expert witness, Calkins, is not sufficient nor is it supported by admitted evidence to support conclusion of a tax deficiency nor unreported income as to the Defendant.

Respectfully submitted,

/s/ MAURICE J. HINDIN,

Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed May 1, 1956.

No. 15112

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

RAYMOND PERCIBELL,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S OPENING BRIEF.

MAURICE J. HINDIN,
6399 Wilshire Boulevard,
Los Angeles 48, California,
Attorney for Appellant

FILE

OCT 17 1966

PAID BY DEBITOR

TOPICAL INDEX

	PAGE
Statement of the pleadings and facts disclosing basis for this court's jurisdiction	1
Concise statement of the case.....	2
Argument	4

I.

The court erroneously instructed the jury and also failed to adequately instruct the jury as to the law of the case, and the instructions given to the jury, taken all together, gave an incomplete and erroneous statement of the law of the case which constituted prejudicial error.....	4
A. The court's instructions were inadequate as to "reasonable doubt"	4
B. The court's instruction was inadequate as to the effect of use of "character witnesses".....	6
C. The court refused to give a requested "cautionary instruction" to the jury.....	8
D. The court's instructions regarding the "net worth method" were insufficient and inaccurate.....	11
E. The court failed to instruct the jury as to the "adequacy of the defendant's books".....	14
F. The court erred in refusing to give the instructions requested by the defendant.....	15
G. The cumulative effect of all the foregoing errors constituted substantial, prejudicial and reversible error.....	16

II.

The court erred in admitting in evidence an affidavit of the defendant referred to as "Government's Exhibit 32" and without corroboration it cannot be the basis of the judgment	17
Conclusion	20

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aplin v. United States, 41 F. 2d 945.....	20
Daeche v. United States, 250 Fed. 566.....	20
Davena, Jr. v. United States, 198 F. 2d 230.....	20
Edgington v. United States, 164 U. S. 361, 17 S. Ct. 72.....	7
Holland v. United States, 348 U. S. 121, 75 S. Ct. 127.....	
.....5, 8, 10, 11, 13	13
Isaacs v. United States, 159 U. S. 487.....	19
Mangum v. United States, 289 Fed. 213.....	20
Miller v. United States, 120 F. 2d 968.....	8
Morris v. United States, 156 F. 2d 525.....	8
Smith v. United States, 340 U. S. 147, 75 S. Ct. 194.....	19
Spriggs v. United States, 198 F. 2d 782.....	18, 20
Warszower v. United States, 312 U. S. 342.....	19
Wiggins v. United States, 64 F. 2d 950.....	18
Wilson v. United States, 232 U. S. 563, 34 S. Ct. 347, 728 L. Ed. 728	6

STATUTES

Internal Revenue Code of 1939, Sec. 145(b)	1
United States Code, Title 18, Rule 37.....	2
United States Code, Title 18, Rule 39.....	2
United States Code, Title 18, Sec. 3772.....	2
United States Code, Title 26, Sec. 145(b).....	1

No. 15119
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RAYMOND PERCIFIELD,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S OPENING BRIEF.

**Statement of the Pleadings and Facts Disclosing Basis
for This Court's Jurisdiction.**

The Defendant and Appellant was accused in the United States District Court for the District of Nevada in two counts of an Amended Information charging him with violation of Section 145(b) of the Internal Revenue Code of 1939 (Title 26, United States Code, Sec. 145(b)). The Amended Information is set forth commencing on page 4 of the Transcript of the Record. To the Information the Defendant and Appellant pleaded "not guilty" and trial

was had before a jury. On the 21st day of February, 1956, the jury returned a verdict of "guilty as to each count" [Tr. R. p. 11]. Thereafter, a Motion for New Trial was filed [Tr. R. pp. 11-14], and, thereafter, on the 12th day of March, 1956, the trial court made an order denying the Motion for New Trial [Tr. R. p. 15]. On the 16th day of March, 1956, the Defendant and Appellant appeared before the trial court and the court thereupon passed sentence upon the Defendant and Appellant [Tr. R. pp. 16-17]. On the 20th day of March, 1956, the Defendant and Appellant herein filed his Notice of Appeal [Tr. R. pp. 19-21], and on May 1, 1956, the Defendant and Appellant herein filed a concise statement of points relied upon [Tr. R. pp. 360-361].

Jurisdiction is conferred upon this court to review the judgment of conviction by provisions of Title 18, United States Code, Section 3772, and Title 18, United States Code Rules 37 and 39, respectively.

Concise Statement of the Case.

In support of the Government's case for fraud, the Government's proof was presented under two theories, namely, the net worth theory and the bank deposit theory [Tr. p. 255]. The Defendant and Appellant maintained books and records [Exs. 30-31], which the Government inferentially charged were inaccurate in that they did not reveal certain income which the Government contended the Defendant and Appellant had during the two taxable years in question.

As chief grounds for reversal of the judgment of conviction, the Defendant and Appellant urges the following points:

1. The court erroneously instructed the jury and failed to adequately instruct the jury as to the law of the case, and the instructions given to the jury, taken all together, gave an incomplete and erroneous statement of the law of the case which constituted prejudicial error.

2. The court erred in admitting in evidence an affidavit of the Defendant referred to as "Government's Exhibit 32" [Tr. R. p. 209] over Defendant's objections thereto, and without corroboration it cannot be the basis of the judgment.

For purpose of clarity, each of the foregoing points will be expressly stated and discussed in the Argument section of Defendant and Appellant's brief.

ARGUMENT.

I.

The Court Erroneously Instructed the Jury and Also Failed to Adequately Instruct the Jury as to the Law of the Case, and the Instructions Given to the Jury, Taken All Together, Gave an Incomplete and Erroneous Statement of the Law of the Case Which Constituted Prejudicial Error.

A. The Court's Instructions Were Inadequate as to "Reasonable Doubt."

The court gave six instructions relating to reasonable doubt. These instructions were numbered, as follows: No. 7 [Tr. R. p. 326]; No. 10 [Tr. R. p. 328]; No. 11 [Tr. R. p. 328]; No. 12 [Tr. R. p. 328]; and No. 13 [Tr. R. p. 329].

While the trial court made frequent use of the term "reasonable doubt", in only one of the instructions, to-wit, No. 12 [Tr. R. p. 328], did it attempt to define "reasonable doubt". In Instruction 12, the court used language which the Defendant and Appellant respectfully submits is confusing and misleading and is intrinsically erroneous. The objectionable language is found in the following portions of the instruction: "It is not mere possible doubt but it is such doubt as would govern or control a person in the more weighty affairs of life" and further "doubt to be reasonable must be actual and substantial not merely possibility or speculation."

The vice of this instruction rests in the failure of the court to cast the subject matter in a form readily understandable by a jury. It is respectfully submitted that reasonable doubt is not such doubt as would govern or control a person in the more weighty affairs of life but

rather the kind of doubt that would make a person hesitate to act. It is the type of doubt which in the ordinary conduct of life prevents a person from acting or doing some affirmative act because of the doubt which he feels with reference to its wisdom or outcome. Here it is the kind of doubt which should deter a juror from acting, *i. e.*, from returning a verdict of "guilty". This view is supported by a decision of the United States Supreme Court in the case of *Holland v. U. S. A.*, 348 U. S. 121, 75 Sup. Ct. 127, in which Mr. Justice Clark, speaking for the court said

"Even more insistent is the petitioner's attack not made below on the charge of the trial judge as to reasonable doubt. He defined it as 'the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.' We think this section of the charge should have been in the terms of the kind of doubt that would make a person hesitate to act, see *Bishop v. U. S.*, 107 Fed. (2) 297, 303, rather than the kind on which he would be willing to act."

While in the *Holland* case the court did not find this error to be reversible error in the light of the other instructions therein given, it is respectfully submitted that no other curative instructions are present in this case. This error, coupled with the other error in the record of this case, constitutes, we think, reversible error.

A further serious problem is presented by the use of the following language in Instruction No. 12, namely: "Doubt to be reasonable must be actual and substantial not mere possibility or speculation". The term "actual and substantial" in itself negates and wholly neutralizes the basic concept of "reasonable doubt". If, after con-

sidering all of the evidence the jurors hold an actual and substantial belief either as to the truth of the charges in the Information or an actual and substantial disbelief, then it is respectfully submitted the state of the jurors' minds admits of no possible reasonable doubt. Reasonable doubt is a state of mind whereby the very existence of uncertainty in a juror's mind would compel him to say, "I do not feel an abiding conviction to a moral certainty of the truth of the charge". The requirement as contained in Instruction No. 12 that the jurors in order to have a reasonable doubt within the meaning of the law must have "an actual and substantial doubt" goes beyond the definitions which have heretofore been judicially approved of the term "reasonable doubt". In the case of *Wilson v. United States*, 232 U. S. 563, 34 Sup. Ct. 347, 728 L. Ed. 728, the Supreme Court approved an instruction which read in part "If you are in the frame of mind where, if it was a matter of importance to you in your own affairs, away from here you would pause and hesitate before acting, then you have a reasonable doubt". To such an instruction the Appellant was entitled in the trial court. The use of the language "Doubt to be reasonable must be actual and substantial not merely possibility or speculation" changes the substance of doubt from one of inherent uncertainty and hesitation which it is, in contemplation of law, to one of certainty and substance which it is not.

B. The Court's Instruction Was Inadequate as to the Effect of Use of "Character Witnesses."

The court gave one instruction only with reference to character witnesses. This was Instruction No. 49 [Clk. Tr. p. 346]. The Defendant did not take the stand in his own defense. He did offer, however, several character

witnesses, namely, Joyce Proctor [Tr. R. pp. 182-186], William Smith [Tr. R. pp. 232-237], William Elam [Tr. R. pp. 238-240], and Hugh Coldwell [Tr. R. pp. 241-246]. The effect of the character witnesses, therefore, was vital so far as the Defendant's case was concerned. The Appellant has no objection to the court's Instruction No. 49 as far as it went. It omitted, however, one element which Appellant respectfully urges rendered it insufficient and fatally defective. This element is a statement of the legal effect of character witnesses. The missing element is a statement of the legal proposition that evidence of good character of an accused may in and by itself alone be enough to produce in the minds of the jury reasonable doubt as to the Defendant's guilt. Quoting from the Supreme Court of the United States in the case of *Edgington v. United States*, 164 U. S. 361, 17 Sup. Ct. 72, we find the following language: "The circumstances may be such that an established reputation for good character if it is relevant to the issue would alone create a reasonable doubt although without it the other evidence would be convincing." While Instruction No. 49 properly instructs the jury as far as it goes, in view of the fact that the Defendant did not take the stand in his own behalf and relied upon his presumption of innocence, a further instruction embodying the missing element was necessary to adequately instruct the jury on the subject of character witnesses. The court in order to have adequately instructed the jury on the subject of character witnesses should have instructed them that evidence of good character of the Defendant in itself may produce reasonable doubt. A careful reading of all of the instructions given in this case fails to supply this vital missing element.

While Instruction No. 49 in its present form was submitted by trial counsel for the Defendant, it is respectfully

submitted that the missing element should have been given to the jury by the court whether included in the Defendant's suggested instructions or not. In a criminal case it is the duty of the court to instruct the jury on all essential questions of law whether requested or not. *Morris v. United States*, 156 F. 2d 525, *Miller v. United States*, 120 F. 2d 968. It is, therefore, respectfully submitted that the learned trial court failed to adequately instruct the jury on the question of character evidence.

C. The Court Refused to Give a Requested "Cautionary Instruction" to the Jury.

The Defendant requested that the court given an instruction designated as "Defendant's C" [Tr. R. pp. 7-8]. The trial court refused to give this instruction and in place thereof gave two instructions designated as Instructions No. 26 and 27 [Tr. R. pp. 336-338]. The Defendant objected and took appropriate exception to the court's refusal to give his Instruction C and to Instructions 26 and 27, which the court did give to the jury [Tr. R. pp. 354-356]. The first half of the Defendant's requested Instruction C is in the nature of a cautionary instruction. That a cautionary instruction is necessary and desirable in cases in which the Government seeks to prove a tax fraud by the net worth theory is found in the language of the Supreme Court in the case of *Holland v. U. S. A.*, 348 U. S. 121, 75 Sup. Ct. 127.

In that case, Mr. Justice Clark speaking for a unanimous court used the following language which is applicable to this case and which affords substantial precedent for the defendant's requested cautionary charge:

"While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The

complexity of the problem is such that it cannot be met merely by the application of general rules, *cf.*, *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 489. A trial court should approach these cases in the full realization that the taxpayer may be ensnared in a system which, although difficult for the prosecution to utilize is equally hard for the Defendant to refute. Charges should be especially clear including, in addition to the formal instructions a summary of the nature of the net worth method, the assumptions upon which it rests, and the inferences applicable both for and against the accused. The appellate court should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

In this case, the Defendant requested a cautionary instruction which with minor changes embodied the actual language of the Supreme Court opinion. For purpose of continuity, the court's attention is now called to the language of the Defendant's requested cautionary Instruction No. C [Tr. R. pp. 7-8]. The Defendant requested that the court instruct the jury, as follows:

"Ladies and Gentlemen of the Jury: It is my duty to say to you that the conclusion has been reached from experience that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach the net worth cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the de-

fendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused”

The Supreme Court in the *Holland* case indicates that where net worth method is used the complexity of the problems cannot be met by mere application of the general rules. Nowhere throughout the entire body of instructions given by the court do we find any statement substantially to the effect that the taxpayer may be ensnared in a system which though difficult for the prosecution to utilize is equally hard for the defendant to refute. Such a cautionary instruction, we think, is directly related to the problem of reasonable doubt. Without such a cautionary instruction, a necessary and comprehensive facet of the over-all problem of reasonable doubt and the adequacy of instructions relating thereto is missing. This is especially true of a situation such as is present in this case. Here the defendant did not take the stand in his own defense. Whether or not he possessed sufficient education or training to dispel the conclusions of the Government's trained experts in the field of accounting is, of course, speculative, but the fact that he did not take the stand is all the more compelling a reason, we submit, why the jury should have been given the cautionary instruction requested. The Supreme Court directed its observation in the *Holland* case to trial courts and especially admonished them to frame their jury instructions with special clarity. The instructions to the jury in this case do not meet the standards of clarity nor is there included the special admonition above referred to in net worth cases.

D. The Court's Instructions Regarding the "Net Worth Method" Were Insufficient and Inaccurate.

The court instructed the jury with reference to the net worth method in Instructions No. 26 and 27 [Tr. R. pp. 336-338]. The court rejected, however, the Defendant's requested instruction covering the net worth theory as it was embodied in requested Jury Instruction No. C [Tr. R. pp. 7-8]. The vice of the instructions as given by the court lies in the failure of the court to clearly instruct the jury as to both the inferences available for the Government and inferences available for the accused which may be drawn from application of the net worth theory. That the court must instruct the jury as to both sets of inferences has been enunciated by the Supreme Court in the *Holland* case *supra*. Both the last sentence of the Defendant's requested Instruction C [Tr. R. p. 8] and the last sentence of Instruction No. 26 as given by the court [Tr. R. p. 337], recognize that if at the end of a year a person owns more property than he had at the beginning of the year it goes without saying that he got it from some place. The Defendant's instruction, however, is careful to point out that while the difference could be taxable income, there may be sources from which the increased net worth are not taxable and would, therefore, not be considered taxable income.

The last sentence of the court's Instruction No. 26 unequivocally states that if a man owns more property than he had at the beginning of the year, it may be inferred that this was part of his taxable income. Contrasted to this unequivocal statement is the other available inference presented to the jury, namely, that the increase in net worth may not be part of his taxable income. This inference was hinted at only by the language of the in-

struction, "and if it is shown that he did not get it by gift or inheritance or loan". Even this inferential type of instruction fails to include a very common source of nontaxable increase of net worth. The appreciation of the market value of property held or owned by a taxpayer at the end of a year as compared to its value at the start of a year will reflect an increase in net worth of the taxpayer. Such increase in net worth, however, is not taxable income unless, of course, the property has been sold and a profit realized by the taxpayer on the sale during the taxable year.

It is respectfully submitted that in instructing the jury on the net worth theory, the Defendant is entitled to instructions covering two phases of the subject, to-wit, first, to an instruction clearly stating that not all increases in net worth constitute taxable income, and, second, to an instruction enumerating each basic category of acquisition of wealth or property which is not in itself taxable income. It is respectfully submitted that the instructions as given by the court failed in each of these particulars.

The danger present in the form of the instructions on the net worth theory as given by the court is further pointed out by Instruction No. 27. The Defendant excepted to this instruction also [Tr. R. p. 356]. The vice of this instruction is the fact that it points to one possible inference only and that in the Government's favor rather than in the two inferences. It omits any reference to an inference which may be drawn in favor of the Defendant. The last sentence of Instruction No. 27 indicates that if the Defendant had a net worth in particular years and also had a business or calling of a lucrative nature, that the income is then taxable. This inference is only partially true. The instruction should have pointed out that if

the jury found an increase in net worth resulted from taxable transactions of the business of the Defendant and also did not find that the increase in net worth resulted from nontaxable acquisition of property, only then could it be inferred that such income is taxable.

In other words, the fact that the jury could have found that the increase in net worth, if it found any to exist, was the result of nontaxable gain, was a legitimate inference which could have been drawn by the jury in the Defendant's favor. The failure of the court in instructing the jury as to available inferences in the Defendant's favor while explicitly instructing them as to inferences to be drawn in favor of the Government renders this instruction, we think, likewise fatally defective under the explicit admonition regarding the use of the net worth method as expressed by the Supreme Court in the *Holland* case.

The cumulative effect of Instructions No. 26 and 27, as given by the court, is such as to amount to an instruction that only one inference is actually possible from proof of increased net worth, namely, that it was taxable income. This, we respectfully submit, fails to substantially meet the requirements of an adequate instruction on the net worth theory. It has been clearly established by the Supreme Court in the *Holland* case, *supra*, that a requisite to the use of the net worth method is the presence of competent evidence supporting the inference that the Defendant's net worth increases are attributable to current taxable income.

Increases in net worth standing alone cannot be assumed to be attributable to currently taxable income. *Holland v. United States*, *supra*. It is respectfully submitted that the Defendant was entitled to an instruction to this effect,

and that a careful reading of all of the instructions given to the jury does not supply this missing charge.

Likewise, the court should have instructed the jury that in using the net worth theory of proof, the jury should first find from proof beyond a reasonable doubt that an increase in net worth actually occurred. If they do not so find, then the Defendant should be acquitted. Secondly, if they do find that there was an increase in the Defendant's net worth in the given year, they must find beyond a reasonable doubt that the increase was taxable income. If they do not find the increase was taxable income, they should acquit the Defendant. In the instruction given as to the cash expenditure method [Instruction No. 25, Tr. R. p. 335], the court used this correct method of instructing the jury. It was not used, however, as to the net worth method.

Since both the net worth method and the cash expenditure method were used in this case by the Government, it cannot be ascertained which theory the jury relied upon in returning the verdict of "guilty". And, further, it cannot be said the same result would have followed had the jury been correctly instructed as to the net worth theory.

**E. The Court Failed to Instruct the Jury as to the
"Adequacy of the Defendant's Books."**

The instructions are further defective for the reason that the basis of the use of the net worth method or other form of proof is that the Defendant's books are inadequate or incorrect. This recognized by the statement in Instruction No. 26 to the effect that "The Government

is authorized by law if the books of the taxpayer are found to be inadequate to adopt a reasonable method of ascertaining income.” Again in Instruction No. 30, reference is made to where a taxpayer’s records are inadequate or inaccurate in substantial respect. A careful reading of all of the instructions given in this case, however, fails to disclose a definition of what constitutes “inadequate or inaccurate books or records”. Likewise, no definition is found of the term “substantial respect”. It is respectfully submitted that the very use of the net worth method or the bank deposit and cash expenditure method is dependent upon a finding by the jury that the taxpayer’s records were in fact inadequate or inaccurate in substantial respect within a defined meaning of such terms. Here, no such definition was given the jury and no such instruction requiring the jury to find such inadequacy or inaccuracy in the taxpayer’s books or records as a condition precedent to the use of the net worth method was given. This represents, we think, further substantial error.

F. The Court Erred in Refusing to Give the Instructions Requested by the Defendant.

The court refused to give Defendant’s Instructions B and C [Tr. R. pp. 7-8]. The court noted that the reason for the refusal to give these instructions was that they were covered by Instructions 26 and 27. For the reasons set forth in the next preceding section, the Appellant respectfully submits that his Instructions B and C should have been given to the jury, and that the Instructions 26 and 27 do not substantially cover the matter set forth in Defendant’s Instructions B and C.

**G. The Cumulative Effect of All the Foregoing Errors
Constituted Substantial, Prejudicial and Reversible Error.**

The Appellant sincerely and respectfully urges that the cumulative effect of the foregoing errors in instructions to the jury constituted substantial, prejudicial and reversible error. The judgment should be reversed, we submit.

Irrespective of the quantum of proof adduced by the Government, the state of the record discloses that the Appellant in the trial court relied upon his presumption of innocence. The instructions to the jury should, therefore, we submit, be carefully scrutinized. Where several errors appear in the instructions, as we submit they did here, the question of the cumulative effect of numerous erroneous instructions should be considered. Appellant herein respectfully urges that had the jury been adequately instructed, a different judgment could well have resulted. The correction of any one of the numerous errors might have balanced the outcome in the Defendant's favor.

We cannot assume that the jury did not follow the court's instructions. Rather we must assume that the jury did follow the court's instructions. Where several instructions are erroneous, no one can tell which error tipped the scales. Any one of the errors may well have been the fatal one for the defendant.

II.

The Court Erred in Admitting in Evidence an Affidavit of the Defendant Referred to as "Government's Exhibit 32" [Tr. R. p. 209], and Without Corroboration It Cannot Be the Basis of the Judgment.

As part of the Government's case, an affidavit of the Defendant was introduced in evidence over the Defendant's objections [Tr. R. p. 209].

The exact theory under which the Government introduced this affidavit is not clear. It is assumed, however, that the affidavit was offered in the nature of an admission against interest by the Defendant to prove one element of the *corpus delicti*, namely, a source of unreported income. The Information covered the taxable years of 1948 and 1949. The Defendant was not accused of any income tax evasion for the year 1950. The affidavit of the Defendant contained an admission that the Defendant neglected to show all income on income tax returns during the calendar years 1948, 1949 and 1950, and that the source of the additional unreported income was gambling. The affidavit, we think, was inadmissible for the following reason: Since it made no attempt to allocate or segregate unreported lump sum income during the three years in question, it could have no substantial probative value to prove non-reported income for any particular year. If it is proof of receipt of any taxable income and unreported income for the years 1948 and 1949, how much should be allocated to those years and how much to 1950? Obviously, it could not be used by a trier of fact to support a

fact that any given amount of income was received in any specific year. If it cannot support such a fact, it is non-corroborative of any fact to be proved by the Government. It should, therefore, have been excluded.

Likewise, the affidavit cannot be said to have been corroborated by any competent evidence to support the same. Standing alone, it could not support a judgment of conviction. *Wiggins v. United States*, 64 F. 2d 950. Likewise, no *corpus delicti* has been established, and, therefore, the affidavit should have been excluded and cannot be the basis of the conviction. *Spriggs v. United States*, 198 F. 2d 782.

In the case of *Spriggs v. United States*, 198 F. 2d 782, this court reversed a conviction for tax evasion where the Government's proof also made use of the Defendant's admissions. In the *Spriggs* case, the court used the following language:

"Whether this evidence upon which the judgment below must stand or fall is to be regarded as a confession or as admissions or as extra-judicial statements is of no consequent here. Under any name they are insufficient to sustain the conviction for there has been no independent proof of any crime having been committed. We deem it unnecessary to decide whether the lower court erred as Appellant contends in admitting this testimony of certain government agents concerning statements made to them by Appellant. Even if the admissibility of such testimony be assumed, arguendo, the government case still falls far short of establishing the guilt of Appellant by the further evidence required by our decision in *Davena, Jr. vs. U. S.*"

The general rule that the accused may not be convicted on his own uncorroborated confession has been consistently recognized by the Supreme Court in the case of *Warszower v. United States*, 312 U. S. 342, *Isaacs v. United States*, 159 U. S. 487, as well as the case of *Smith v. United States*, 340 U. S. 147, 75 Sup. Ct. 194. The case of *Smith v. United States* applies the corroboration rule to admissions as well as confessions.

It was incumbent upon the Government in proof of its case to show a source of the Defendant's allegedly not reported income. This it sought to show was from gambling activity of the Defendant. The evidence, however, showed that the Defendant reported his gambling income on his tax returns [Tr. R. p. 138, Ex. D in evidence]. There is no evidence that this gambling income as reported was incorrect except for this affidavit. It is respectfully submitted that no competent evidence was admitted to either establish the *corpus delicti* or the offense without resort to Defendant's affidavit. Aside from the Defendant's affidavit, there would be no competent evidence in the record that the Defendant received any taxable income from his gambling activity over or above that amount which he reported on his tax return. The books and records of the Defendant as they reflected his income from his established businesses were not shown to be inaccurate or erroneous. In short, the entire Government's case stood upon proof of an outside source of income of the Defendant. Without the Defendant's Affidavit, no *corpus delicti* was established. It is, therefore, submitted

that the conviction should not be permitted to stand upon this extra judicial statement of the Appellant.

The reported cases are not in agreement as to the extent or degree of the corroboration required. *Mangum v. United States*, 289 Fed. 213; *Aplin v. United States*, 41 F. 2d 945; *Daeche v. United States*, 250 Fed. 566. While this circuit has stated that evidence corroborating a confession of a defendant need not independently prove the commission of the crime charged neither beyond a reasonable doubt nor by a preponderance of the proof, *Davena, Jr. v. United States*, 198 F. 2d 230, still some corroboration is required and the quantum required is a matter of law. See, also, *Spriggs v. United States*, 198 F. 2d 782.

Conclusion.

It is, therefore, respectfully submitted that for the foregoing reasons the judgment of conviction should be reversed.

Respectfully submitted,

MAURICE J. HINDIN,

Attorney for Appellant.

No. 15,119

United States Court of Appeals
For the Ninth Circuit

RAYMOND PERCIFIELD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

CHARLES K. RICE,

Assistant Attorney General,
Tax Division, Department of Justice,
Washington, D. C.,

FRANKLIN RITTENHOUSE,

United States Attorney,
Reno, Nevada,

STANLEY H. BROWN,

Assistant United States Attorney,
Reno, Nevada,

CLYDE R. MAXWELL, JR.,

Assistant Regional Counsel,
Internal Revenue Service,
San Francisco, California,

Attorneys for Appellee.

FILED

NOV 29 1956

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
A statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this court has jurisdiction to review the judgment in question	1
Statute involved	3
Statement of the case, presenting the questions involved and the manner in which they are raised	3
Questions presented in this case	13
Argument	14
I. The alleged errors urged in appellant's brief should not be considered for failure to comply with Rule 18 of the Rules of the Court of Appeals for the Ninth Circuit	14
II. Instructions given by the trial court were correct and adequate	16
A. The court's instructions were adequate as to reasonable doubt	16
B. Instruction No. 49 on character testimony was adequate	18
C. The instructions given by the Court on the net worth method were proper	19
D. It was not necessary for the Court to instruct the jury on the definition of inadequate or inaccurate books or records	25
E. There was no plain or substantial error in the instructions given by the court to the jury	27
III. The court properly admitted in evidence Exhibit 32—affidavit of appellant	28
IV. Summary	34
Conclusion	35

Table of Authorities Cited

Cases	Pages
Armstrong v. United States, 41 F. 2d 162	19
Baugh v. United States, 27 F. 2d 257, cert. den. 278 U.S. 639, 49 S.Ct. 34, 73 L.ed. 554	19
Bernstein v. United States, 234 F. 2d 475	18
Campodonico v. United States, 222 F. 2d 310, cert. den. Oct. 10, 1955, U.S.	24, 33
Cly v. United States, 9 Cir., 201 F. 2d 806	15
Daveña v. United States, 198 F. 2d 230	33
DuVerney v. United States, 9 Cir., 181 F. 2d 853	15
Eastman v. United States, 153 F. 2d 80	23
Finnegan v. United States, 204 F. 2d 105	30
Gordon v. United States, 202 F. 2d 596	15, 27, 28
Herzog v. United States, 226 F. 2d 561, affirmed on rehear- ing en banc (1956), 235 F. 2d 664	16, 19, 23, 26, 28
Holland v. United States, 348 U.S. 121, 75 S. Ct. 127, 99 L. ed 150	17, 18, 23, 24, 26
Kasper v. United States, 225 F. 2d 274	19
Legatos v. United States, 222 F. 2d 678	24
Lii v. United States, 9 Cir., 198 F. 2d 109	15
Miles v. United States, 103 U.S. 304	18
Mosca v. United States, 9 Cir., 174 F. 2d 448	15
Remmer v. United States, 205 F. 2d 277, affirmed on further review (1955), 222 F. 2d 720, reversed on other grounds (1956), 350 U.S. 377, S. Ct., L. ed.	24
Silkworth v. United States, 10 F. 2d 711, cert. den. 271 U.S. 664, 46 S.Ct. 475, 70 L. ed. 1139	23
Smith v. United States (1954), 348 U.S. 147, 75 S. Ct. 194, 99 L. ed. 192	34

TABLE OF AUTHORITIES CITED

iii

	Pages
United States v. Calderon, 348 U.S. 160, 75 S. Ct. 186	34
Ziegler v. United States, 9 Cir., 174 F. 2d 439	15

Codes

Internal Revenue Code of 1939, Title 26, Section 145(b) ..	3
18 U.S.C., Section 3231	3
28 U.S.C., Section 1291	3

Rules

Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18(2)(d)	3, 13, 14, 27, 28
Federal Rules of Criminal Procedure, Rule 30	16, 26, 28
Federal Rules of Criminal Procedure, Rule 52(b)	16, 17, 18

No. 15,119

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RAYMOND PERCIFIELD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Nevada.

BRIEF FOR THE UNITED STATES.

**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING THE BASIS UPON WHICH IT IS CONTENDED THAT
THE DISTRICT COURT HAD JURISDICTION AND THAT
THIS COURT HAS JURISDICTION TO REVIEW THE
JUDGMENT IN QUESTION.**

Having waived indictment, the appellant, Raymond Percifield, was charged by original information filed on April 2, 1955, and by amended information filed August 17, 1955, in the District Court for the District of Nevada, as follows:

Count One—For willful and knowing attempt to evade and defeat income tax owing by him and his wife for the year 1948 by means of filing false and fraudu-

lent income tax returns which understated their income tax in the amount of \$2,041.92.

Count Two—For willful and knowing attempt to evade and defeat income tax owing by him for the year 1949 by means of filing a fraudulent income tax return which understated his income tax in the amount of \$559.76.

A plea of not guilty to these charges was entered, and the matter came on for trial on February 13, 1956, before the Honorable John R. Ross, Judge. On February 21, 1956, the jury found the appellant guilty as charged in both counts of the information. Motion for new trial (R. 11) was filed on February 24, 1956, and was denied after argument on March 12, 1956. (R. 15.)

On March 16, 1956, Judge John R. Ross sentenced the appellant to \$5,000 fine and three years imprisonment on Count One. The execution of the imprisonment portion of the sentence was suspended and the appellant was placed on probation for three years. Appellant was fined \$5,000 on Count Two and given three years imprisonment, to run concurrently with the imprisonment sentence imposed in Count One, execution thereof being also suspended and appellant being placed on probation for three years.

It was further ordered by Judge Ross that \$5,000 of the \$10,000 cash bail on deposit with the Clerk be applied on the fine as above imposed and that the appellant be granted five days to apply the additional \$5,000, which apparently belonged to W. D. Fortner, to the fine. (R. 16.)

The notice of appeal declares that the appellant has paid the aforesaid fines in full. (R. 20.)

Jurisdiction of the district court was conferred by 18 U.S.C., Sec. 3231, and Rule 18, Federal Rules of Criminal Procedure. This Court has jurisdiction under 28 U.S.C., Sec. 1291. Notice of appeal was filed on March 22, 1956. (R. 21.) No bail was set on appeal.

STATUTE INVOLVED.

Title 26, Int. Rev. Code of 1939, Sec. 145(b).

PENALTIES

* * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

Appellant's brief does not contain a summary of the evidence produced at the trial. For the convenience of the Court, the Government presents the following statement of facts:

During the years 1948 and 1949 the appellant, Raymond Percifield, was the owner and operator of an illegal gambling casino at Rangely, Colorado, known as the Ace-High Club. (R. 196.) The business establishment, which was on the main street of a small town temporarily overpopulated by an oil boom, contained a bar, a lounge, a cafe, and a casino room where it was conclusively established any of the usual games of chance could be played, including blackjack or "21", poker, craps, or dice, as well as slot machines. (R. 118.) Percifield had purchased this club from Joe Rosa in October 1947 (R. 58) for \$70,000, including \$3,500 worth of inventory (R. 59).

Percifield also owned another gambling casino at Wendover, Nevada, just over the Utah State line (R. 199, 200) and during the years involved he said he supplemented his income from these two gambling casinos by making the "rounds" running games in Colorado, Wyoming, Montana, Nevada and Utah (R. 202).

For the year 1948 two income tax returns were filed by Percifield at Reno, Nevada, one purporting to report income from the Ace-High Club and the other purporting to report his income from the Nevada Club. (Exs. 1, 2, 4.) The return for the Nevada Club showed a net loss of \$6,751.37, whereas the return for the Ace-High Club showed a net profit of \$335.66. (R. 302.) For the year 1949 Percifield filed an income tax return at Reno, Nevada. (Exs. 3, 5.) This return showed a net loss of \$3,923.07. (Ex. 3; R. 277.)

By the testimony of third party witnesses, by various documents, by stipulation, and by the testimony of in-

vestigating agents James Bell and Michael Thomas, evidence was introduced relating to the bank deposits, the net worth at cost basis, and the cash expenditures of the appellant. Testimony of the various witnesses and the content of the documents and stipulations were summarized by the expert witness for the Government, Forrest P. Calkins, Technical Advisor, Office of Regional Counsel, Internal Revenue Service, in Exhibit 34 and in his testimony. (R. 250 *et seq.*) These computations were the subject of little or no controversy at the trial, and no error is assigned in appellant's brief relating to any item appearing thereon. It should be noted that cross-examination developed that the figure for net income per returns filed in 1948, shown as a loss of \$7,-087.03 was overstated by approximately \$670.00. (R. 303.) This error does not affect his computation of corrected net income, however. (R. 302.) For the convenience of the Court, the first two pages of Exhibit 34, that is, without the supporting schedules, are reproduced at pages 1 and 2 of the appendix. The exhibits or testimony in support of each item of the computations is noted in the last column of each schedule.

The Court will note that the great majority of the items making up the two computations are based upon independent third party testimony or records. The testimony of the witnesses J. Leslie Carter (R. 24, R. 66); Clifford C. White (R. 29); Cora Craft (R. 32); E. Joseph Winder (R. 39); Donald Oakley (R. 46); Jennie Rosa (R. 51); Joe Rosa (R. 58); William W. Smith (R. 70); W. D. Fortner (R. 78); and Blake Craft (R. 94) was only in respect to net worth items, bank records or cash expenditures, and will not be further related.

Reference to the income tax returns filed for the year 1948 will immediately disclose that gambling income at the Nevada Club was reported but that no individual gambling income and no gambling receipts at the Ace-High Club are shown. (Exs. 1, 2; R. 138, 141.)

The Government introduced the testimony of Robert J. May (R. 103-106), James L. Lockett (R. 107-110), William B. Beemer (R. 110-112), and William Lehman (R. 117-119) to the effect that gambling games were being operated by Percifield at the Ace-High Club at Rangely, Colorado, during the years 1948 and 1949. One of the appellant's witnesses, William H. Elam, Mayor of the town of Rangely, also so testified. (R. 239-240.)

Edward H. Stroud testified that he sold the appellant a "21" layout, a crap table layout and poker chips with denominations ranging from 50¢ to \$25.00 in August and September 1949. These items were consigned to the appellant at Rangely, Colorado, care of the Ace-High Club. (R. 86-93.)

Eleanor Jones testified that she made monthly summary records for the appellant for the Ace-High Club for a portion of the year 1947 and the years 1948 and 1949 (R. 123); that Percifield was to make up and give her a daily record of receipts and that she told him to put down all income, including his gambling income, and to be sure to keep a record of it (R. 123-124); that she got these daily records from the appellant but that he did not put down his gambling income because he didn't want to show it on the monthly summary (R. 124); and that, in any event, she did not know whether he kept any record of his gambling income and she did

not see one. (R. 125.) She identified Exhibit 30 as a monthly check and deposit summary between the dates of January 1948 and December 1949 and stated that she made it up from cancelled checks, check stubs and ledger sheets furnished to her by the appellant. (R. 126.) She also identified Exhibit 31 as her monthly summary of receipts for the Ace-High Club for March to October 1948. (R. 127.)

Mrs. Jones did not prepare either of the 1948 returns but did make a full summary sheet for Mr. Percifield in connection with the Ace-High Club expenses and receipts for his use for this purpose (R. 132.) It contained, she said, no information as to gambling receipts or losses as to the Ace-High Club since he did not give her that information. (R. 124, 125, 132.) The appellant produced this record on cross-examination of Mrs. Jones. (Ex. L, R. 164, 170, 171.) It includes a column for "Police Protection" (R. 172) but contains no column for or information as to gambling receipts of the Ace-High Club (R. 173).

Mrs. Jones did prepare the 1949 return from her summary records for the Ace-High Club and from the Nevada Club records. (R. 132.) She did not keep any records for the Nevada Club but these were given to her by Percifield at the time she prepared the return. (R. 132.)

She said she discussed the 1949 income tax return with Percifield and asked him if he had any other income. He said "No," although he knew she didn't have any record of his gambling receipts either on his individual account or at the Ace-High Club. (R. 134, 135, 138.)

James Bell, special agent for the Internal Revenue Service, testified that he started his investigation on September 22, 1952, of the income tax returns of Percifield for the years 1948, 1949 and 1950. (R. 193, 195.) He interviewed Percifield at the Ace-High Club on September 30, 1952, at which time he elicited from the appellant certain details of his personal history and told him he was investigating his returns for the years 1948 to 1950, inclusive. (R. 193-195.) He then told Percifield that "he had the right, under the Constitution, to refuse to answer any questions, to refuse to supply any information and any information he gave us or any records that he produced might be used against him in any proceeding, criminal or otherwise, which might hereafter be undertaken by the United States. I also informed Mr. Percifield that he had the right to have an attorney present. I asked him if he fully understood and he said he did." (R. 195.)

Percifield told him that his only sources of income were the Nevada Club and the Ace-High Club and that he had received no non-taxable monies during the years 1948 to 1950. (R. 196.) He said he had no cash on hand except the bank roll at the Nevada Club. (R. 196.) He told Bell about various assets, as furniture, jewelry and furs, Buick automobiles, and inventory. (R. 196, 197.)

Percifield then told Bell that he made about a thousand dollars in gambling games during the years 1948 to 1950. (R. 197, 198.) He said he kept no record of this income (R. 198), which was derived from "21", dice and poker games (R. 198). He said his living expenses were approximately \$3,000 a year and were paid by cash. (R. 198.)

For the Ace-High Club he said he had his cancelled checks and bank statements and that either he or Mrs. Percifield prepared a daily report which would show the receipts and payouts for the particular date. (R. 198.)

Percifield told Bell he never made payments to local welfare agencies or paid bribes to police officers in return for permission to operate gambling at the Ace-High Club. (R. 199.) Witnesses Donald C. Rider, William Lehman and William H. Elam, however, testified to "donations" to the town of Rangely paid by the Ace-High Club and other gambling clubs (R. 113, 116, 117, 120, 121, 240) and Exhibit "L" shows that money was paid for "police protection" (R. 172).

Percifield said William H. Bacon, Salt Lake City (deceased at time of trial), had prepared his 1948 return and Mrs. Eleanor Jones had prepared his 1949 return from records that he had furnished to Mrs. Jones and the records that she kept for him. (R. 199.)

In the afternoon of the same day Bell showed Percifield the payments that had been made on the Rosa note in 1948 to 1950, inclusive, (Ex. 20) and asked where he got the money to make those payments and pay his living expenses (R. 201). The answer was "'I told you that I gambled, but I didn't know it was that much.' He said, 'I have taken part in games in Colorado, Wyoming, Montana, Nevada and Utah.' He said, 'I even left this place for two or three weeks at a time, I have taken part in dice, twenty-one, mostly poker games.' . . . I said, 'Now do I understand you took these trips from time to time and stayed away from two to three weeks

at a time?' I asked him, 'Are these gambling trips?' He said, 'No, I wouldn't want to put it down that way. I don't like the sound of it.' " (R. 202.)

Bell then asked Percifield if he would give him an affidavit explaining the source of the apparent omission of about \$36,000. Percifield said he wouldn't want to sign any statement without his attorney, and they agreed to meet at his attorney's office the next day. (R. 202.)

Bell asked if the \$2,250 a month that he was paying on the Rosa mortgage was gambling income, and Percifield said, "Well, no, some months I would win more than that, but I had agreed to those payments . . ." (R. 203.)

Percifield told Bell that only the bar, cafe and lounge receipts of the Ace-High Club were shown on his daily receipt reports. (R. 203.)

The next day, October 1, 1952, Bell went to the office of Mr. Percifield's attorney, a Mr. Balcome at Meeker, Colorado. Mr. Balcome was the Assistant District Attorney for that district, with offices in the Court House. (R. 204.) Mr. Balcome was advised by Mr. Bell that he desired an affidavit relating to the source of the payments on the Rosa note and living expenses of Percifield (R. 205) and, although at first reluctant, Mr. Balcome dictated an affidavit for Mr. Percifield to sign (R. 206-208). The affidavit was executed and notarized and given to Bell by Balcome. (R. 208.)

During the course of dictating the affidavit, Balcome asked Bell if he could promise, in the event of a trial, that the affidavit would not be used, and was answered in the negative by Bell. (R. 207, 208.)

The affidavit, Exhibit 32, is set out in full at R. 209 and R. 210, but for the convenience of the Court is here reprinted in full in the appendix, page 3.

The next time Mr. Bell saw Mr. Percifield, on January 25, 1953, Percifield refused to answer any further questions. (R. 211, 212.) Bell testified that he received in the way of records from the appellant the check register and monthly summary sheets of expense for the years 1948 and 1949, the original of Exhibit 30 in evidence. (R. 212.) As far as records of income were concerned, however, he received only the monthly summary of cash receipts and payouts for the limited period beginning March of 1948 and ending in October 1948 (R. 212, 213; Ex. 31) and daily report sheets for the period October 1947 to February 25, 1948. Only the daily report sheets for October 1947 referred to gambling income, the remainder did not. (R. 213, 214; Ex. 33.) The agents also had cancelled checks and bank ledger sheets. (R. 223-224.) They were never given the records of the Nevada Club. (R. 215.) They were not given any records showing gambling income other than the daily sheets of the Ace-High Club for October 1947. (R. 216.)

Bell testified that he made an investigation as to loans and nontaxable receipts but found none other than those already in evidence. (R. 216-218.)

Forrest P. Calkins, Technical Advisor, Office of Regional Counsel, Internal Revenue Service, testified at some length relating to his computations of income and tax on two methods—bank deposits and cash expenditures, and net worth and expenditures. (R. 250-294; Exs. 34, 35; Appendix pp. 1 and 2.) He testified that

the appellant's records in evidence were kept on a cash basis and that the returns were on a cash basis except for the use of inventory; that this was a hybrid system and would properly reflect income, if complete, and that the Commissioner would have no right to change the method used; and that he had prepared his computations on the same basis. (R. 251-255.)

In defense appellant put seven witnesses on the stand:

Joyce Proctor, County Superintendent of Schools, Meeker, Colorado, and formerly Principal of the school at Rangely, Colorado, testified that Percifield had a good reputation in the community. She also testified as to general business conditions in the town of Rangely in 1945 to 1949. Although she dropped in to the Ace-High Club on week-ends and after school, she said she never saw any gambling on the premises (R. 182-186);

William W. Smith testified that Percifield had a good reputation in the 1930's (R. 232);

William H. Elam, Mayor of Rangely, Colorado, testified he knew Percifield since 1950 and that he had a good reputation. (R. 238.) He said that gambling was allowed in Rangely, even if illegal, and that he knew there was gambling at the Ace-High Club but that this did not bear on Percifield's reputation as they were donating to the town (R. 239-240);

Hugh L. Caldwell, County Commissioner, Rio Blanco County, Colorado, for 17 years, testified that Percifield had a good reputation; that Rangely was a boom town; and that business dropped off after Percifield bought the Ace-High Club (R. 241, 242);

Robert Fulton, Sheriff of Rio Blanco County, Colorado, from January 14, 1947 to January 13, 1955, testified he visited the Ace-High Club once a week and that Percifield had a good reputation. (R. 247, 248.) He testified that the oil boom in Rangely was over in mid-1948 and that he never saw any gambling at the Ace-High Club although he heard rumors of it (R. 249) ;

Morris Lange, a building contractor, testified he saw an addition built to the Ace-High Club from across the street while he was building another building. He testified that the whole building had a 20-year life as of 1947 although he had never examined any other parts of the building (R. 188-192) ;

Charles S. Glenn, manager of the Peraldo Distributing Company, a beverage store, testified as to the existence of an accounts payable at the end of the year 1949 for the Nevada Club (R. 228).

Raymond Percifield, defendant and appellant, did not take the stand.

QUESTIONS PRESENTED IN THIS CASE.

(1) Should alleged errors argued in appellant's brief be considered in view of the failure of his brief to comply with Rule 18(2)(d) of the Rules of the United States Court of Appeals for the Ninth Circuit?

(2) Were the instructions to the jury incomplete and erroneous?

(3) Did the Court err in admitting in evidence the affidavit of appellant? (Ex. 32.)

ARGUMENT.

- I. THE ALLEGED ERRORS URGED IN APPELLANT'S BRIEF SHOULD NOT BE CONSIDERED FOR FAILURE TO COMPLY WITH RULE 18 OF THE RULES OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit, effective May 27, 1953, provides in part as follows:

“1. Counsel for the appellant shall file with the clerk of this court 20 copies of a printed brief, and serve upon counsel for the appellee three copies thereof, within 30 days after the clerk has mailed to him copies of the printed record.

“2. This brief shall contain, in order here stated :

“(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in the instructions refused, together with the grounds of the objections urged at the trial. . . .”

No specification of errors is contained in appellant's brief. The instructions which he complains to have been given erroneously or to have been erroneously refused are not set out in *totidem verbis* anywhere at all in appellant's brief, nor are the objections urged to the trial

court thereto set out anywhere in appellant's brief. The grounds urged at the trial for objection to the admission in evidence of the affidavit (Ex. 32) now alleged improperly admitted into evidence are not set out anywhere in appellant's brief, nor is the full substance of the affidavit set out anywhere in appellant's brief. In the case of *Gordon v. United States* (C. A. 9th, 1953), 202 F. 2d 596, another income tax evasion case, it was held that the errors alleged in a specification of errors section in appellant's brief need not be considered where it failed to set out (1) the instructions requested in *totidem verbis* which were alleged improperly refused; (2) the grounds, if any, of the objections thereto, if any, urged at the trial; (3) the full substance of the evidence alleged improperly admitted or rejected; and (4) the grounds, if any, urged at the trial for the objections thereto, if any.

As authority for the above decision, there is cited in the *Gordon* case at 202 F. 2d 596, 598, the cases of "*Ziegler v. United States*, 9 Cir., 174 F. 2d 439; *Mosca v. United States*, 9 Cir., 174 F. 2d 448; *DuVerney v. United States*, 9 Cir., 181 F. 2d 853; *Lii v. United States*, 9 Cir., 198 F. 2d 109; *Cly v. United States*, 9 Cir., 201 F. 2d 806."

It is respectfully submitted that in view of the appellant's complete failure to quote anywhere in his brief the material substance of the basis for his arguments, the Court should not consider the errors alleged by appellant in his brief.

II. INSTRUCTIONS GIVEN BY THE TRIAL COURT
WERE CORRECT AND ADEQUATE.

A. The Court's instructions were adequate as to reasonable doubt.

In Section I A of appellant's argument he complains that language used in Instruction No. 12 is confusing, misleading and erroneous. Since this instruction is nowhere set out in full in the appellant's brief, it is set out herein for the convenience of the Court, and reads as follows:

"A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charges in a count of the information, there is not a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation." (R. 328, 329.)

No objection or exception was taken to this instruction by the appellant. Therefore, this alleged error should not be considered unless it can be said to be "plain" error under Rule 52(b) of the Federal Rules of Criminal Procedure. *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664. Rules 30 and 52(b) of the Federal Rules of Criminal Procedure read as follows:

"Rule 30. Instructions

"At the close of the evidence or at such earlier time during the trial as the court reasonably di-

rects, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

“Rule 52. Harmless Error and Plain Error

“(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

Appellant did not offer any instruction on reasonable doubt.

Appellant complains of isolated phrases in the instruction and fails to read it as a whole and with the other instructions, particularly Nos. 10, 11, 13, 45 and 50.

Appellant seeks to identify Instruction No. 12 with the instruction criticized but held *NOT* prejudicial error in *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.ed. 150, but it is clear that the language used in Instruction No. 12 is completely different and more favorable to the appellant than the instruction considered in the *Holland* case. In any event, assuming the two to be identical, the giving of this instruction would not be “plain error” under Rule 52(b), Federal Rules of

Criminal Procedure, when the Supreme Court regards it as an error which was not prejudicial even though proper exception was taken.

As was held in the case of *Bernstein v. United States* (C.A. 5th, 1956), 234 F. 2d 475, 487, it is preferable not to define reasonable doubt, citing *Holland v. United States, supra*, and *Miles v. United States*, 103 U.S. 304, 312, but there is no error where the charge to the jury as a whole conveys the principle of reasonable doubt in criminal case to the jury.

B. Instruction No. 49 on character testimony was adequate.

The appellant complains that the Court's instruction on character testimony was inadequate. Since this instruction was not set out in appellant's brief, it is reprinted herein in *totidem verbis*:

"You are instructed, that some evidence has been received as to the character of the defendant. You will give to this evidence of good character such weight as you think it is entitled to receive and if after a consideration of all the evidence, facts, and circumstances in the case, including the evidence of good character, you have a reasonable doubt as to whether the defendant is guilty or innocent, then it be your duty to find the defendant not guilty." (R. 346, 347.)

No exception was taken to this instruction by the appellant. As a matter of fact, it was offered by the appellant as Appellant's Instruction "A". (R. 6.)

Error alleged by the giving of this instruction will not be considered by the Court of Appeals unless it can be said to be plain error under Rule 52(b), Federal

Rules of Criminal Procedure. *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664.

Appellant argues with respect to this instruction that it was proper as far as it goes but did not include the statement that evidence of good character may in and by itself alone be enough to produce in the minds of the jury reasonable doubt as to the appellant's guilt. It is respectfully submitted that the instruction in essence contained this proposition. No other instruction on character testimony was offered by appellant.

An instruction in all respects similar to this instruction was adjudged sufficient in the case of *Kasper v. United States* (C.A. 9th, 1955), 225 F. 2d 274, 278, another income tax evasion case. See also *Armstrong v. United States* (C.C.A. 9th, 1930), 41 F. 2d 162; *Baugh v. United States* (C.C.A. 9th, 1928), 27 F. 2d 257, *cert. den.* 278 U.S. 639, 49 S.Ct. 34, 73 L.ed. 554.

C. The instructions given by the Court on the net worth method were proper.

Appellant urges error in the failure to give his Instructions "B" and "C" and in the giving of Instructions Nos. 26 and 27. (Appellant's brief, Argument Sections I C, I D and I F.) Since these instructions are not reprinted in full in appellant's brief, they are here set out in full, together with the objections urged before the trial court:

"Instruction B

"You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the

defendant on a given date, followed by proof of a greater net worth on a later date, does not mean that the difference between the two amounts is income." (R. 7.)

* * * * *

"Mr. Puccinelli: May it please the Court, we except to the Court's refusal to give defendant's requested instruction B, as it is a correct statement of the law and is not covered by any other instruction given by the Court." (R. 354.)

"Instruction C

"Ladies and gentlemen of the jury it is my duty to say to you that the conclusion has been reached from experience that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows: Take all of the assets of the taxpayer on a given date which would include all tangible property, cash on hand or in banks, securities, and accounts receivable from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of

assets and liabilities and deduct the result thereof from the net worth at the beginning of the period, and the difference could be income but there may be sources which increase net worth that are not taxable and would not be considered income." (R. 7, 8.)

* * * * *

"We except to the Court's refusal to give defendant's requested Instruction C, as it is a correct statement of the law and is not covered by any other instruction of the Court." (R. 354.)

"No. 26

"The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the methods of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

"The government is authorized by law, if the books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has been undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

"If, at the end of a year, a man owns more [sic] property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by

gift or inheritance or loan, it may be inferred that it was part of taxable income.” (R. 336, 337.)

* * * * *

“We except to Instruction No. 26, because it is not a correct statement of the law and is indefinite, confusing and misleading.” (R. 356.)

“No. 27

“The government has placed before you evidence relating to the net worth of Raymond and Mossie Percifield at the end of each of the years 1947 to 1949, inclusive. A defendant’s net worth for a given year is the difference between his assets and liabilities, and increase in net worth for a year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute a defendant’s taxable net income by the net worth method, you should subtract from the increase in net worth for any given year any non-taxable funds received during the year and then add the defendant’s non-deductible expenditures for that year which would, of course, include his living expenses and the income taxes paid during the year. These expenditures are added in order to compute net income because they are not represented in the assets which the defendant [sic] has accumulated during the year and they are nondeductible expenses. If you find that the defendant had an increase in net worth for the years 1948 or 1949, and also had a business or calling of a lucrative nature, there is evidence that the defendant had net income for that year and if the amount exceeds exemptions and deductions, then that income is taxable.” (R. 337, 338.)

* * * * *

“We except to Instruction No. 27, because it is not a correct statement of the law, and is indefinite, uncertain and misleading.” (R. 356.)

Appellant’s objections were general in nature and insufficient to permit assignment of error in the refusal or giving of these instructions. Rule 30, Federal Rules of Criminal Procedure: *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664; *Eastman v. United States* (C.C.A. 8th, 1946), 153 F. 2d 80, 84.

The first portion of Instruction “C” is not a statement of law, but is rather an argumentative commentary on the evidence and hence was properly refused by the trial court. See *Silkworth v. United States* (C.C.A. 2d, 1926), 10 F. 2d 711, 720, *cert. den.* 271 U.S. 664, 46 S.Ct. 475, 70 L.ed. 1139.

The concluding phrase of the instruction, stating that the increase in net worth “could be income but there may be sources which increase net worth that are not taxable and would not be considered income” is wholly inconclusive and incomplete. The same may be said of Instruction “B”. In effect, these two instructions would tell the jury that no inference could be drawn from a net worth increase. As is held in *Holland v. United States*, 348 U.S. 121, 137, 75 S.Ct. 127, 99 L.ed. 150, 165:

“... Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient. . . .”

In this respect, appellant argues that he was entitled to an instruction to the effect that increases in net worth standing alone cannot be assumed to be attributable to currently taxable income, citing *Holland v. United States, supra*. He was given such an instruction by No. 23, which reads as follows:

“The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.” (R. 333, 334.)

See also *Campodonico v. United States* (C.A. 9th, 1955), 222 F. 2d 310, *cert. den.* Oct. 10, 1955, U.S.

In any event, the Court gave the usual cautionary instructions relating to the presumption of innocence, reasonable doubt, and direct and circumstantial evidence. (Instructions Nos. 10, 11, 12, 13 and 45 reprinted in the appendix hereto.) These instructions and Instructions Nos. 26 and 27 fully covered the substance of Instructions “B” and “C”.

With respect to Instructions Nos. 26 and 27, these instructions are substantially the same as instructions given in the cases of *Remmer v. United States* (C.A. 9th, 1953), 205 F. 2d 277, 290, affirmed on further review (1955), 222 F. 2d 720, reversed on other grounds (1956), 350 U.S. 377, S.Ct., L.ed., and *Legatos v. United States* (C.A. 9th, 1955), 222 F. 2d 678, 685.

While the appellant argues that these instructions were inadequate, it is noted that no adequate instructions were submitted to the trial court by the appellant.

Certainly, Instructions Nos. 26 and 27 are more complete and more accurate than the last sentence of Instruction "C" or than the whole of Instruction "B".

The specific complaint of appellant that he is entitled to an instruction clearly stating that not all increases in net worth constitute taxable income is obviously covered by the last paragraph of Instruction No. 26. Certainly appellant did not submit an instruction clearly setting out this proposition and enumerating what increases in net worth do not constitute taxable income. Further, there was no issue presented to the trial court or to the jury from which it could be found that the appellant was in receipt of more non-taxable receipts than were included in the Government computations.

Appellant complains that the jury should have been instructed that in using the net worth theory they should find beyond a reasonable doubt that an increase in net worth actually occurred and also find beyond a reasonable doubt that the increase was taxable income and, if not, they should acquit the appellant. Appellant submitted no such instruction and ignores the fact that appellant's income was also computed on the bank deposits and cash expenditures method and that the jury did not have to find anything relating to the appellant's net worth if they used this method of determining whether the appellant had unreported income.

D. It was not necessary for the Court to instruct the jury on the definition of inadequate or inaccurate books or records.

In Section I E of the argument in appellant's brief, on page 14, appellant claims it to be substantial error that the Court failed to instruct the jury as to the adequacy of the appellant's books.

No instruction of this nature was offered by appellant, nor was any exception taken in the trial court to a refusal or failure to give such an instruction.

Appellant argues that the jury should have been instructed that it must first find inadequacy or inaccuracy in the taxpayer's books and records as a condition precedent to the use of the net worth method.

Again, no such instruction was offered nor was any exception taken to the refusal or failure to give such instruction.

In any event, such is not the law. *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.ed. 150, holds that the Government is not required to show the books of a taxpayer to be inaccurate or inadequate as a prerequisite to the use of the net worth method. It is therein stated that the net worth method is simply circumstantial proof of unreported income and that its use as circumstantial evidence in a criminal case is not intended to be circumscribed by the provisions of the Internal Revenue Code in any respect.

Appellant complains that Government's Instructions Nos. 26 and 30 do not define what constitutes inadequate or inaccurate books and records, but no exception was taken to Instruction No. 26 on this ground and no exception at all was taken to Instruction No. 30. (R. 356.)

No exceptions or objections having been taken in the trial court as to the above, appellee respectfully submits that the matters in this section should not be considered under the decision of *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664, and Rule 30, Federal Rules of Criminal Procedure.

E. There was no plain or substantial error in the instructions given by the Court to the jury.

In Section I G of his brief, appellant simply argues that the errors he claims to have pointed out in Sections I A, B, C, D, E and F of his brief constitute substantial prejudicial and reversible error.

As hereinbefore noted, the errors urged by the appellant should not be considered by the Court of Appeals since there is no compliance in the first section of the brief with Rule 18(2) (d) set out in Section I of appellee's brief, upon the authority of *Gordon v. United States* (C.A. 9th, 1953), 202 F. 2d 596.

Secondly, the alleged errors complained of were not the subject of proper or specific exception to the trial court, as below detailed:

Argument Section of Appellant's Brief	No. of Instruction	Subject	Exception or Objection
I A	12	Reasonable Doubt	None
I B	"A" or 49*	Character Testimony	None*
I C	"C"	Net Worth "Caution"	Correct law ; not covered
I D, I F	26	Net Worth Theory	Incorrect law ; in- definite, confusing and misleading
I D, I F	27	Net Worth Computation	Incorrect law ; in- definite, uncertain and misleading
I F	"B"	Net Worth Increase Not Income	Correct law ; not covered
I E	None	Definition of Inadequate Books	None
I E	30	Use of Net Worth and Bank Deposits Methods	None

*This instruction submitted by appellant.

Certainly appellant's brief does not show wherein these instructions constitute plain error and why the clear provisions of Rule 30 of the Federal Rules of Criminal Procedure should not apply. *Herzog v. United States* (C.A. 9th, 1955), 226 F. 2d 561, affirmed on rehearing en banc (1956), 235 F. 2d 664.

Further, appellant fails to consider the general rule that the instructions should all be read together and isolated phrases should not be considered in themselves error.

III. THE COURT PROPERLY ADMITTED IN EVIDENCE EXHIBIT 32—AFFIDAVIT OF APPELLANT.

The second section of the argument in the appellant's brief is devoted to the allegation that an affidavit of the appellant was improperly admitted in evidence.

In this section of the brief, again, appellant has not complied with Rule 18(2)(d) in that he has not set out anywhere in his brief, in the "points urged," in the argument, or anywhere else, the full substance of the evidence admitted and has not quoted the grounds urged at the trial for the objection.

Under the wording of *Gordon v. United States* (C.A. 9th, 1953), 202 F. 2d 596, and the cases therein cited, the Appellate Court need not consider this assignment of error. Should the Court, nevertheless, desire to consider the matters urged by appellant in his brief, the affidavit in question is set out in full in the appendix to this brief, page 3. The grounds urged at the trial for the objection were as follows:

“Mr. Anderson: We object to this exhibit or affidavit on the following grounds: That there is no evidence of any warning at the time of signing this purported affidavit that it would be used against the defendant in the event of a criminal prosecution, that the witness’ evidence shows that it was not given freely and voluntarily, and upon the further ground that the purported document includes income from gambling for 1948, 1949 and 1950, without any segregation as to what the amount was in any year.” (R. 208-209.)

The first two grounds urged at the trial court, to-wit, that there was no evidence of any warning of the appellant’s constitutional rights at the time the affidavit was signed and that the testimony of Special Agent Bell showed that the affidavit was not given to him freely and voluntarily have apparently been abandoned, for they are not argued in the appellant’s brief. This is understandable, for the affidavit was dictated by the appellant’s attorney and handed by that attorney to the special agent. (R. 205-208.) In addition, the record shows without contradiction that Percifield was warned of his constitutional rights (R. 195) when first contacted by the investigators, and it cannot be assumed that the appellant’s attorney was ignorant of appellant’s rights.

In the trial court, as above stated, the objection was urged that the “purported document includes income from gambling for 1948, 1949 and 1950 without any segregation as to what the amount was in any year.” This objection would not, of course, go to the admissibility

of the document but rather to its weight. Cf. *Finnegan v. United States* (C.A. 8th, 1953), 204 F. 2d 105. The same can be said of appellant's argument to this effect which attempts to elaborate upon this ground of the objection. The absurdity contained in appellant's argument, it is respectfully submitted, is quite obvious from the following statement at page 17 of appellant's brief:

“If it is proof of receipt of any taxable income and unreported income for the years 1948 and 1949, how much should be allocated to those years and how much to 1950? Obviously, it could not be used by a trier of fact to support a fact that any given amount of income was received in any specific year. If it cannot support such a fact, it is non-corroborative of any fact to be proved by the Government. It should, therefore, have been excluded.”

Of course the affidavit was admissible. It does not, it is true, relate to a specific amount of omitted gambling receipts in each of the years 1948 and 1949, but it is an admission that the appellant did have gambling receipts which he did not report on his returns for those two years.

The appellant argues that the affidavit of the appellant (Ex. 32) cannot be said to be corroborated by any competent evidence to support the same (appellant's brief, p. 18). Reference to the statement of facts, which were not in any manner or form brought to the attention of the trial court by the appellant's brief, will readily disclose the existence of an overabundance of corroborating evidence which stands completely uncontradicted in the record.

There was evidence that the appellant was running an illegal gambling casino at Rangely, Colorado. The town was wide open and so were appellant's gambling facilities. There was the testimony of Eleanor Jones, who kept his summary records for the Ace-High Club, to the effect that she told the appellant to put down his gambling income on his daily reports; that he failed to do so, and that the receipts on the return of the Ace-High Club did not include the appellant's gambling receipts, even though his expenses did include payoffs for police protection for this lucrative activity.

Certainly the affidavit is corroborated by the independent testimony of disinterested third party witnesses as to the net worth assets and liabilities of the appellant and as to the bank deposits greatly in excess of reported gross receipts, and by the very returns themselves, which show no net income but net losses, while the appellant waxed fat and prosperous.

It is also argued by appellant that the Government has not established *corpus delicti* in this case independent of the admissions of the appellant. It is indeed hard to conceive how *corpus delicti* could be more well established than it was in this case. By independent third party testimony, the Court and the jury were presented the picture of a gambler who deliberately failed to report his individual gambling receipts and his gambling receipts from the operation of an illegal casino. They were shown how his assets increased and how his liabilities decreased during these two years. They were shown how his bank deposits at Rangely, Colorado, were heavy and greatly exceeded the gross receipts shown in

his summary records for the Ace-High Club. They were shown how he himself banked and ran the gambling games at the Ace-High Club. They were finally shown that when it came to income tax time the gambling receipts were omitted from the income tax return.

The appellant also alleges that the evidence shows that the appellant reported his gambling income on his tax returns and that there was no evidence that the gambling income as reported was incorrect except for the affidavit. It is submitted that the testimony of Eleanor Jones, the appellant's bookkeeper, clearly and convincingly shows that the appellant did not report his gambling income from the Ace-High Club. It is true that he did report some gambling income from the Nevada Club. However, that there was gambling income from the Ace-High Club is beyond question when there is considered the testimony of Edward A. Stroud (R. 86-94); Robert J. May (R. 103-106); James L. Lockett (R. 107-110); William B. Beemer (R. 110-112); William Lehman (R. 117-121); Bert Taylor (R. 174-182); William H. Elam (R. 238-240); and Robert Fulton (R. 247-249). From their testimony and from that of Eleanor Jones to the effect that appellant made no record of his gambling income, and that when they discussed the 1949 return he told her that he had no income other than that on the records, it is clear that the Ace-High gambling receipts were not reported. There was, therefore, ample independent evidence of source of unreported income and of intent not to report it.

As to the amount of the unreported income, independent testimony, documents and stipulations furnished the

primary basis for computations of corrected income far in excess of that reported on the income tax returns. To illustrate this fact, computations of income by the bank deposits and cash expenditures method and by the net worth method are included in the appendix, pages 1 and 2. These schedules are the same as the first two pages of Exhibit 34, put in evidence through the testimony of Forrest Calkins, the Government expert witness, except that there has been added thereto a column referring to the testimony and exhibits in evidence whence each item on the two schedules was derived. Income so proven compared with income reported on the return is as follows:

Year	Income per Returns	INCOME CORRECTED	
		Bank Deposit Method	Net Worth Method
1948 (Loss)	(\$ 6,415.71)	\$14,095.54	\$14,502.78
1949 (Loss)	(3,923.07)	7,975.23	6,550.24
Totals (Loss)	(\$10,338.78)	\$22,070.77	\$21,053.02

Proof of unreported income by these methods, proof of a likely source of the unreported income, and proof of the intent of appellant are sufficient to establish the crime of income tax evasion without more. Certainly it is sufficient to establish the *corpus delicti* and the required corroboration of appellant's affidavit.

Davena v. United States (C.A. 9th, 1952), 198 F. 2d 230, *cert. den.* (1952), 344 U.S. 878, 73 S.Ct. 168, 97 L.ed. 680;

Campodonico v. United States (C.A. 9th, 1955), 222 F. 2d 310, *cert. den.* U.S., S.Ct., L.ed. (Nov. 10, 1955);

Smith v. United States (1954), 348 U.S. 147, 75 S.Ct. 194, 99 L.ed. 192;
United States v. Calderon (1954), 348 U.S. 160, 75 S.Ct. 186, 99 L.ed. 202.

IV. SUMMARY.

In summary of appellee's argument, it is respectfully submitted:

1. That appellant's brief is wholly incomplete and inaccurate and should not be considered under Rule 18 of the Court of Appeals for the Ninth Circuit;

2. That there was no error in the giving or refusal to give the instructions as alleged in appellant's brief; that in any event, there is no plain error under Rule 52(b) to take this case out of the operation of Rule 30 of the Federal Rules of Criminal Procedure; and

3. That the affidavit of the appellant was fully corroborated and wholly admissible in evidence, and that the *corpus delicti* of the crime was fully shown.

CONCLUSION.

For the reasons heretofore stated, it is respectfully submitted that the judgment and sentence of the District Court should be affirmed.

Dated, San Francisco, California,
November 28, 1956.

Respectfully submitted,

CHARLES K. RICE,

Assistant Attorney General,
Tax Division, Department of Justice,
Washington, D. C.

FRANKLIN RITTENHOUSE,

United States Attorney,
Reno, Nevada

STANLEY H. BROWN,

Assistant United States Attorney,
Reno, Nevada

CLYDE R. MAXWELL, JR.,

Assistant Regional Counsel
Internal Revenue Service
San Francisco, California

Attorneys for Appellee.

No. 15,119

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RAYMOND PERCIFIELD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the District of Nevada.**

**MOTION TO ASSESS ENTIRE COST OF PRINTING
RECORD AGAINST APPELLANT.**

Comes now the United States and moves the Court to assess the costs of printing the record designated by the appellee and not designated by appellant against the appellant on the following grounds:

1. That appellant's statement of points on appeal include in paragraphs 2 and 3 thereof the statement that appellant intends to rely upon question of the sufficiency of the evidence, thereby requiring the Government to designate the entire record not designated by the appellant in order to meet such proposed argument (R. 361);

2. That appellant argues in Part II of the argument in his brief that the *corpus delicti* was not sufficiently established to permit the introduction of the affidavit of the appellant (Ex. 32) in evidence, and that said affidavit was not sufficiently corroborated, thereby making it incumbent upon the Government to designate the entire record in this case so that this Honorable Court could make a determination of these matters, including, but not limited to, the testimony of the following witnesses:

J. Leslie Carter	(R. 24)
Clifford C. White	(R. 29)
Cora Craft	(R. 32)
E. Joseph Winder	(R. 39)
Donald Oakley	(R. 46)
Jennie Rosa	(R. 51)
Joe Rosa	(R. 58)
William W. Smith	(R. 70)
W. D. Fortner	(R. 78)
Edward A. Stroud	(R. 86)
Blake Craft	(R. 94)
Robert J. May	(R. 103)
James L. Lockett	(R. 107)
William B. Beemer	(R. 110)
Donald C. Rider	(R. 112)
William Lehman	(R. 117)
Bert Taylor	(R. 174)
William H. Elam	(R. 328)

**ARGUMENT IN SUPPORT OF MOTION TO ASSESS COST OF
PRINTING RECORD AGAINST APPELLANT.**

The appellant designated only a minor portion of the testimony of certain witnesses as the record on appeal and yet in the points relied upon on appeal stated that he would question the sufficiency of the evidence to sustain the verdict. (R. 361). Of course, in order to argue the sufficiency of the evidence, the Government was forced to designate the balance of the record. The Government could not and did not know that appellant would not question the sufficiency of the evidence as such in his brief.

While not questioning the sufficiency of the evidence adduced below as such in his brief, appellant does allege in Section II of the argument that the affidavit of the appellant (Ex. 32) was improperly admitted because it was not corroborated by independent testimony and because the *corpus delicti* had not been established by the Government. This, it is respectfully submitted, does require a reading of the entire record by the Court to determine the existence or nonexistence of these factors. For example, the appellant did not designate the testimony of various witnesses relating to the fact that there was gambling at the Ace-High Club, coupled with Mrs. Jones' testimony that the appellant reported no gambling income from the Ace-High Club or from his own individual gambling ventures. The testimony of these witnesses becomes very material to the establishment of the *corpus delicti*, corroboration of the affidavit in question and to the establishment of source of income, all of which the appellant in Section II of his brief states were not shown.

CONCLUSION.

It is respectfully submitted that the cost of printing the entire record on appeal should be assessed against the appellant, regardless of the decision of the Court on the merits.

Dated, San Francisco, California,
November 28, 1956.

Respectfully submitted,

CHARLES K. RICE,

Assistant Attorney General,
Tax Division, Department of Justice,
Washington, D. C.

FRANKLIN RITTENHOUSE,

United States Attorney,
Reno, Nevada

STANLEY H. BROWN,

Assistant United States Attorney,
Reno, Nevada

CLYDE R. MAXWELL, JR.,

Assistant Regional Counsel
Internal Revenue Service
San Francisco, California

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

	Page
Computation of net income—bank deposit and expenditure method	i
Computation of net income—net worth method	ii
Plaintiff's affidavit (Exhibit 32)	iii
Government Instructions:	
No. 10	v
No. 11	v
No. 12	v
No. 13	vi
No. 45	vi

1. Receipts per Bank Records
 - A. First State Bank of Reno 11, 13, 16, 19, 20, 29, 30;
 - B. Cash Not Deposited—S9; Ex. 34, Sched. A; R. 261-2
 - C. Nevada Bank of Commerce; Ex. 34, Sched. I, J.

Total Receipts per Bank Records 11, 13, 16, 19, 20, 29, 30;
2. Cash Expenditures—Not on Schedules I, J 11, 13, 16, 19, 20, 29, 30; Sched. I, J; R. 42, 265, 198
3. Less: Non-Taxable Receipts
 - A. Loan from R. W. Jack 12
 - B. Loan from Nevada Bank; R. 27, 67, 68
 - C. Loan from Clifford W 30
 - D. Loan from Cora Craft 33, 34
 - E. Loan from W. D. For 79-82
 - F. Repayment for purchase of Craft 96
4. Gross Income 11, 13, 16, 19, 20, 29, 30;
5. Less: Allowable Deductions
 - A. Interest paid—Clifford 30
 - B. Interest paid—Joe Rosx. 34, Sched. B
 - C. Interest paid—W. D. For 79-82
 - D. Interest paid—Nevada 2; R. 68
 - E. Bank Withdrawals
 1. First State Bank of Reno; Ex. 34, Sched. E, F
 2. Nevada Bank of Commerce; Ex. 34, Sched. G
 - F. Cash Not Deposited—S9; Ex. 34, Sched. A; R. 262-3
 - G. Non-Cash Outlay Expenses
 1. Inventory Decrease 3; Ex. 34, Sched. K; R. 197, 281
 2. Depreciation—Acc 3; R. 275
 - H. Total Deductions for Allowable Deductions 30, 33, 34, 79-82, 96
6. Adjusted Gross Income 11, 13, 16, 19, 20, 29, 30;
7. Less: Standard Deduction 30
8. Net Income 11, 13, 16, 19, 20, 29, 30;
9. Net Income per returns filed 30
10. Understatement of Net Income 30

COMPUTATION OF NET INCOME
BANK DEPOSIT AND EXPENDITURE METHOD
YEARS 1948, 1949

	<u>1948</u>	<u>1949</u>	
1. Receipts per Bank Records			
A. First State Bank of Rangely—Deposits.....	\$ 99,359.39	\$18,871.44	Exs. 7, 8, 9
B. Cash Not Deposited—Schedule A	7,403.03	2,330.72	Exs. 7, 8, 9; Ex. 34, Sched. A; R. 261-2
C. Nevada Bank of Commerce	21,681.86	614.38	Exs. 13, 15; Ex. 34, Sched. I, J.
Total Receipts per Bank Records.....	<u>\$128,444.28</u>	<u>\$21,816.54</u>	
2. Cash Expenditures—Not on Bank Records— Schedules I, J	8,250.00	7,299.55	Exs. 7, 10, 11, 13, 16, 19, 20, 29, 30; Ex. 34, Sched. I, J; R. 42, 265, 198
	<u>\$136,694.28</u>	<u>\$29,116.09</u>	
3 Less: Non-Taxable Receipts			
A. Loan from R. W. Jackson	\$ 3,500.00		Exs. 10, 11, 12
B. Loan from Nevada Bank of Commerce.....	2,000.00		Exs. 16, 22; R. 27, 67, 68
C. Loan from Clifford White	2,500.00		Ex. 17; R. 30
D. Loan from Cora Craft	3,500.00		Ex. 18; R. 33, 34
E. Loan from W. D. Fortner	1,000.00		Ex. 25; R. 79-82
F. Repayment for purchase of auto for Blake Craft	2,800.00		Ex. 13; R. 96
	<u>\$ 15,300.00</u>	<u>-----</u>	
4. Gross Income	<u>\$121,394.28</u>	<u>\$29,116.09</u>	
5. Less: Allowable Deductions—Cash Outlay			
A. Interest paid—Clifford White		75.00	R. 30
B. Interest paid—Joe Rosa, Schedule B.....	\$ 2,717.53	607.20	Ex. 20; Ex. 34, Sched. B
C. Interest paid—W. D. Fortner	44.00		Exs. 25, 30
D. Interest paid—Nevada Bank of Commerce..	78.84	27.33	Exs. 16, 22; R. 68
E. Bank Withdrawals			
1. First State Bank of Rangely, Sch. E, F...	70,555.72	11,779.81	Exs. 8, 30; Ex. 34, Sched. E, F
2. Nevada Bank of Commerce, Sch. O.....	19,205.50	700.71	Exs. 15, 30; Ex. 34, Sched. G
F. Cash Not Deposited—Schedule A	7,403.03	2,330.72	Exs. 7, 8, 9; Ex. 34, Sched. A; R. 262-3
G. Non-Cash Outlay Expenses			
1. Inventory Decrease Sch. K	375.00		Exs. 1, 2, 3; Ex. 34, Sched. K; R. 197, 281
2. Depreciation—Ace Hi Club	4,394.50	3,100.00	Exs. 1, 2, 3; R. 275
Nevada Club	1,524.62	1,633.95	
H. Total Deductions for Adjusted Gross Income	<u>\$106,298.74</u>	<u>\$20,254.72</u>	
6. Adjusted Gross Income	15,095.54	8,861.37	
7. Less: Standard Deduction	1,000.00	886.14	
8. Net Income	<u>\$ 14,095.54</u>	<u>\$ 7,975.23</u>	
9. Net Income per returns filed.....	(7,087.03)	(3,923.07)	Exs. 1, 2, 3
10. Understatement of Net Income	<u>\$ 21,182.57</u>	<u>\$11,898.30</u>	

NET WORTH METHOD

	<u>1/1/48</u>	<u>12/31/48</u>	<u>12/31/49</u>	
1. Assets				
A. Cash on Hand	\$ 5,000.00	\$ 5,000.00	\$ 5,000.00	R. 200, 196
B. Bank Accounts Schedules E & F				
1. First State Bank of Rangleys...	1,660.12	1,729.79	(178.58)	Exs. 7, 8, 9; Ex. 34, Sched. E, F
2. Nevada Bank of Commerce....	406.57	86.33	Exs. 13, 15
3. Stockmens Bank	86.15	86.15	86.15	Ex. 23; R. 72
4. Stockmens Bank	63.11	63.11	63.11	Ex. 24; R. 73, 74
C. Inventory—Nevada Club	1,200.00	750.00	750.00	Exs. 1, 2, 3; Ex. 34, Sched. K
Ace Hi Club	1,200.00	1,275.00	1,275.00	Exs. 1, 2, 3; R. 197, 281
				Ex. 34, Sched. K
D. Frame Building—Nevada Club....	5,000.00	5,000.00	5,000.00	Exs. 1, 2, 3; R. 281
E. Equipment—Nevada Club	2,500.00	2,500.00	2,500.00	Exs. 1, 2, 3; R. 281
F. Light Plant—Nevada Club	2,951.86	2,951.86	2,951.86	Exs. 1, 2, 3; R. 281
G. Ace Hi Club	66,500.00	66,500.00	66,500.00	R. 59, 281
H. Gambling Equipment—Ace Hi Club			511.30	Exs. 26, 27; R. 92-93, 281-2
I. Household Furniture	500.00	500.00	500.00	R. 196
J. Jewelry	150.00	150.00	150.00	R. 196
K. Automobile	2,400.00	2,400.00	3,461.87	Ex. 19; R. 197
L. Total Assets	<u>\$89,617.81</u>	<u>\$88,992.24</u>	<u>\$88,570.71</u>	
2. Liabilities				
A. Loans and Notes Payable				
1. Joe Rosa	\$49,500.00	\$27,452.53	\$20,559.73	Ex. 20
2. William Bacon	6,500.00	1,000.00	1,000.00	Exs. 10, 11, 12; Ex. 34, Sched. M
3. R. W. Jackson	4,000.00	7,500.00	5,500.00	Exs. 10, 11, 12; Ex. 34, Sched. N
4. W. D. Fortner	2,000.00	1,700.00	1,140.00	Ex. 25
5. Nevada Bank of Commerce....	2,000.00	1,000.00	Ex. 16
6. Clifford White		2,500.00	2,500.00	Ex. 17; R. 30
7. Cora Craft		3,500.00	3,500.00	Ex. 18; R. 34
8. Chattel Mortgage—G.M.A.C....			2,249.47	Ex. 19; R. 47
B. Liabilities—Total	<u>\$64,000.00</u>	<u>\$44,652.53</u>	<u>\$36,449.20</u>	
3. Net Worth	<u>\$25,617.81</u>	<u>\$44,339.71</u>	<u>\$52,121.51</u>	
A. Less: Beginning Net Worth		25,617.81	44,339.71	
B. Increase in Net Worth		18,721.90	\$ 7,781.80	
C. Less: Proceeds from Cattle Sales..		300.00	560.00	R. 81, 82, 287
Depreciation — Ace Hi Club		4,394.50	3,100.00	Exs. 1, 2, 3; R. 287
Nevada Club		1,524.62	1,633.95	Exs. 1, 2, 3; R. 287
		\$ 6,219.12	\$ 5,293.95	
		\$12,502.78	\$ 2,487.85	
D. Add: Non-Deductible Expenses				
1. Living Expenses		\$ 3,000.00	\$ 3,000.00	R. 198, 288
2. Loss on Trade-in on Buick Sch. L			1,790.20	Ex. 19; R. 288; Ex. 34, Sched. L
E. Adjusted Gross Income		15,502.78	\$ 7,278.05	
Less: Standard Deductions		1,000.00	727.81	
4. Net Income		14,502.78	\$ 6,550.24	
A. Net Income per Return		(7,087.03)	(3,923.07)	Exs. 1, 2, 3

PLAINTIFF'S EXHIBIT No. 32

Affidavit

State of Colorado,
County of Rio Blanco—ss.

Raymond S. Percifield, being first duly sworn, on oath, depose and says:

1. That he is Raymond S. Percifield, the owner and operator of the Ace-High Bar and Cafe in Rangely, Colorado, and is a resident of Rio Blanco County, Colorado.

2. That during the calendar years 1948, 1949 and 1950 he neglected to show all income on income tax returns, form 1040, and attached schedules thereto, and that during those years he received personal income in excess of \$36,000.00, part of which additional income is reflected by payments on one certain promissory note given by this affiant as part of the purchase price of the Ace-High Bar and Cafe.

3. That the additional income which was not reported during those three years was obtained from gambling in the States of Colorado, Utah, Wyoming, Montana and Nevada.

4. That this affiant failed to report income received from gambling enterprises during the above years, through ignorance of the requirements of the Internal Revenue Code in that connection, and he is willing at this time to pay all taxes and penalties properly assessable against him in that connection, and states that at no time did he intend to violate any of the provisions of the Internal Revenue Code or defraud the United States Government.

5. That this affidavit is given voluntarily at the request of James W. Bell, Acting Special Agent, United States Treasury Department, and Michael E. Thomas, Internal Revenue Agent, United States Treasury Department.

6. Further Affiant sayeth not.

Witness my hand and seal this 1st day of October, A.D. 1952.

RAYMOND S. PERCIFIELD.

Subscribed and sworn to before me this 1st day of October, A.D. 1952, by Raymond S. Percifield.

[Seal]

ROBERT D. WHITE,

Notary Public.

My commission expires June 4, 1955.

“No. 10

“You are instructed that the defendant is presumed to be innocent and that the presumption of innocence attends him to the end of the trial, or until the verdict is reached, and will prevail, unless it is overcome by evidence which convinces the jury beyond a reasonable doubt of his guilt.” (R. 328.)

“No. 11

“You are instructed that the rule of law which throws around the defendant the presumption of innocence [sic] and requires the government to establish, beyond a reasonable doubt, every material fact averred in the information, is not intended to shield those who are actually guilty from just and merited punishment, but it is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime.” (R. 328.)

“No. 12

“A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charges in a count of the information, there is not a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation.” (R. 328-329.)

“No. 13

“You are to consider only the evidence introduced in this case. A conviction is justified only when such evidence excludes all reasonable doubt, as the same has been defined to you, without it being restated or repeated. You are to understand that the requirements that a defendant’s guilt be shown beyond a reasonable doubt should be considered in connection with and as accompanying all the instructions that are given to you.” (R. 329.)

“No. 45

“Evidence is of two kinds, direct and circumstantial. Direct evidence is that evidence which is given when a witness testifies [sic] directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances from which this jury may infer other and connecting facts, which usually and reasonably follow. Crimes may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence taken as a whole must be consistent with each other, and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant’s innocence.

“In the case of circumstantial evidence it is not necessary that the proof shall be conclusive. It is sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubt in their minds as to his guilt. If the jury believe the facts as shown by the evidence in

this case, as to either count, are all consistent with the supposition that the defendant is guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty of that count; but if the jury do not so believe, they should find the defendant not guilty of that count. All that can be required is not absolute and positive proof, but such proof as convinces the jury that the crime has been made out against the accused beyond a reasonable doubt." (R. 344-345.)

No. 15119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND PERCIFIELD,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

On Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S REPLY BRIEF.

MAURICE J. HINDIN,

6399 Wilshire Boulevard,
Los Angeles 48, California,

Attorney for Appellant.

FILED

DEC 15 1956

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
Argument.....	2
I.	
The errors urged in appellant's brief should be considered notwithstanding any technical deficiency of the briefs with reference to Rule 18.....	2
II.	
Errors urged by appellant constituted reversible error both under provisions of Rule 30 of the Federal Rules of Criminal Procedure as well as Rule 52b of the Rules of Criminal Procedure	4
Conclusion	7

TABLE OF AUTHORITIES CITED

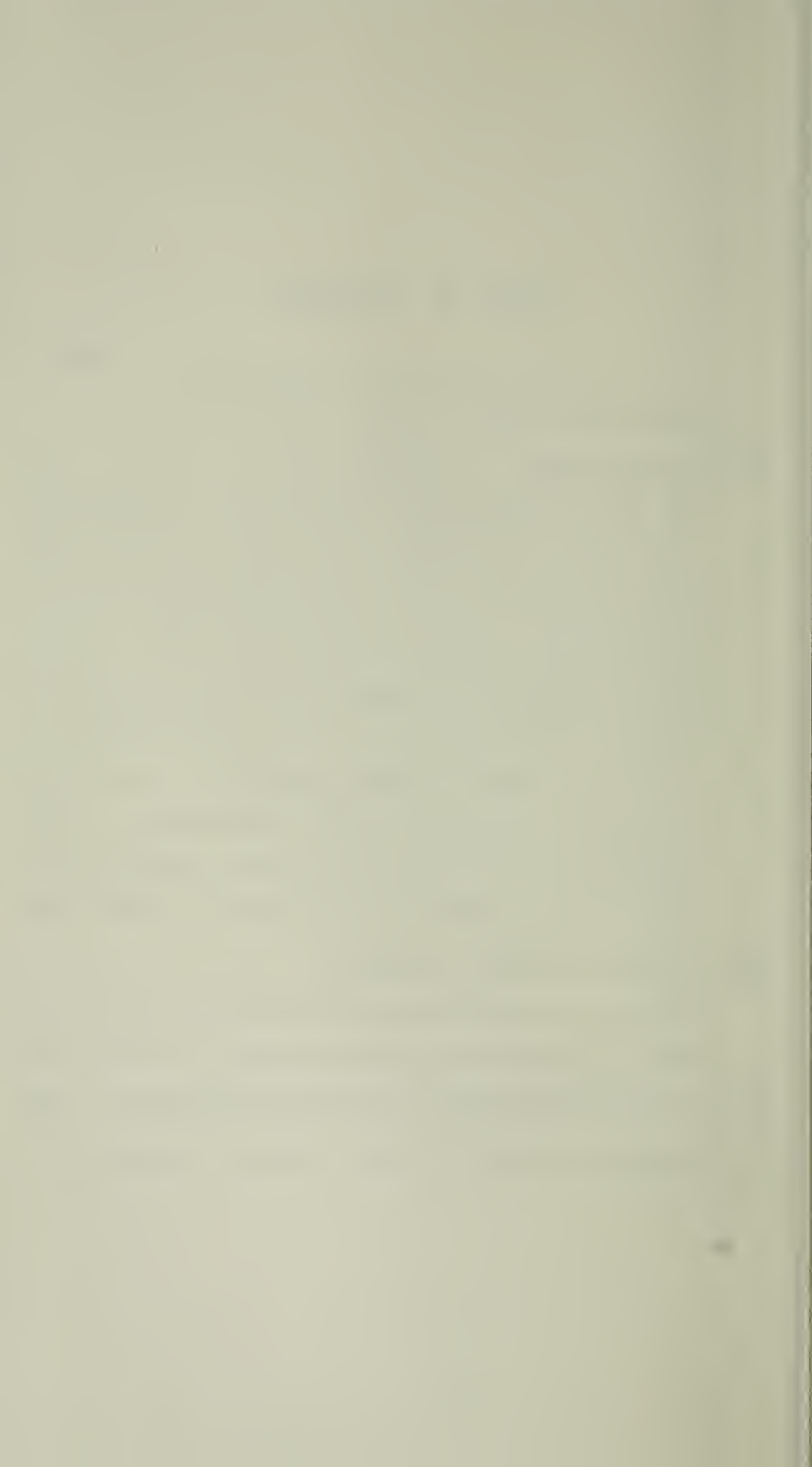
CASES	PAGE
Bihn v. United States, 328 U. S. 633, 66 S. Ct. 1172, 90 L. Ed. 1485	6
Bloch v. United States, 221 F. 2d 786.....	5
Gordon v. United States, 202 F. 2d 596.....	3
Herzog v. United States, 226 F. 2d 561.....	5
Kotteakos v. United States, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557.....	7
McCandless v. United States, 298 U. S. 342.....	6
Morris v. United States, 156 F. 2d 525.....	5
Schino v. United States, 209 F. 2d 67.....	5
United States v. Donnelly, 179 F. 2d 227.....	7

RULES

Federal Rules of Criminal Procedure, Rule 30.....	4
Federal Rules of Criminal Procedure, Rule 52(b).....	1, 5
Rules of the United States Court of Appeals, Rule 18.....	1, 2

INDEX TO APPENDIX

	PAGE
I. Specifications of error.....	1
II. Instructions given	4
No. 7	4
No. 10	4
No. 11	4
No. 12	4
No. 13	5
No. 26	5
No. 27	6
No. 30	6
No. 45	7
No. 49	8
III. Instructions requested but refused.....	8
No. B	8
No. C	8
IV. Proceedings in trial court on objections to instructions.....	10
V. Proceedings in trial court relative to Plaintiff's Exhibit 32..	15



No. 15119
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RAYMOND PERCIFIELD,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

On Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S REPLY BRIEF.

The brief of Appellee raised two matters to which Appellant desires to reply. These matters are, as follows:

1. The Appellee contends that the errors asserted in Appellant's Brief should not be considered by reason of asserted failure of Appellant to comply strictly with the technical requirements of Rule 18 of Rules of the United States Court of Appeals.

2. Appellee contends that errors urged by Appellant were not "plain error" within the meaning of Section 52b of the Federal Rules of Criminal Procedure.

Appellant's reply to these two contentions of Appellee will be set forth and stated separately in the next section of this Reply Brief.

ARGUMENT.

I.

The Errors Urged in Appellant's Brief Should Be Considered Notwithstanding Any Technical Deficiency of the Briefs With Reference to Rule 18.

Appellee asserts that Appellant's Brief failed to comply with the technical requirements of Rule 18 in that the specifications of error are not properly set forth, and that the instructions complained of in Appellant's brief have not been referred to *totidem verbis*, and that the grounds of the objections urged at time of trial were not properly set forth.

Appellant respectfully desires to call to the Court's attention the fact that a Transcript of the entire proceedings before the trial court has been prepared and is part of the record on appeal. Likewise, each instruction referred to in Appellant's brief is set forth in the Transcript of the Record commencing at pages 323 to 353, and that all instructions, both given by the trial court and refused, are set forth *in totidem verbis* in the Transcript of the Record. Likewise, throughout Appellant's brief, specific reference is made to each of the instructions at their appropriate page in the Transcript.

Each of the grounds of objection to the instructions urged at the trial are set forth in full in the Transcript of the Record commencing at page 353 of the Transcript. Appropriate reference to the Transcript of the Record pages is made to these objections where referred to in the Appellant's Brief.

The specifications of error are set forth on page 3 of the Appellant's Opening Brief and also set out as section headings under the Argument section of the Appellant's Brief. The Appellee, we respectfully submit,

was able to clearly understand the import and context of each specification of error even though the errors were referred to as grounds for reversal rather than being termed specifications of error as such.

Appellant, however, desires to comply, if possible, with the letter as well as the spirit of the Rules and, therefore, respectfully submits as part of this brief an appendix section in which the specifications of error are set forth in a form perhaps more in accord with the letter of the Rules of this court than the form originally adopted in Appellant's Opening Brief. Likewise, in the Appendix section Appellant has set forth each instruction referred to in Appellant's Opening Brief *totidem verbis*, as well as other pertinent matter taken directly from the Transcript of the Record.

While this court in the case of *Gordon v. United States*, 202 F. 2d 596, cited by Appellant, has indicated that errors alleged in an Appellant's Brief need not be considered where the Appellant has failed to comply with the requirements of the Rules relating to briefs, it should be noted that in that case as well as in each of the other cases cited therein on the point, the Court did in fact consider the respective points raised by the Appellant notwithstanding the technical defects of the briefs.

It is respectfully submitted that the points urged by Appellant herein relate to substantial rights of the Appellant, and it is respectfully submitted that notwithstanding any defect as to form which might exist as to the Appellant's Brief and which have not been corrected by the incorporation herein of the Appendix hereto, the points urged therein on behalf of the Appellant should be fully considered by the Court.

II.

Errors Urged by Appellant Constituted Reversible Error Both Under Provisions of Rule 30 of the Federal Rules of Criminal Procedure as Well as Rule 52b of the Rules of Criminal Procedure.

Objections were noted at the time of trial to the court's refusal to give Defendant's instructions B and C [Tr. R. p. 354. See also the Appendix to this Brief]. Objections were noted at the time of trial to the court's giving of instructions Nos. 26 and 27 [Tr. R. p. 356. See Appendix attached to this Brief]. The refusal of the court to give the Defendant's requested instructions C and B are the subject of the errors urged before this court in Section 1C and 1F, respectively, of Appellant's Opening Brief. The objections to the court's instructions Nos. 26 and 27 are the subject of Appellant's assignment of error set forth in Sections 1D and 1F of Appellant's Opening Brief. As to each of these matters, it is respectfully submitted that the Defendant in the trial court stated distinctly the matter to which he objected and the grounds of his objection. Appellant has found no authority requiring the Defendant to use any particular language in identifying the matter to which he objects or in stating the grounds of his objection. It is, therefore, respectfully submitted that the Appellant has substantially complied with the requirements of Rule 30 of the Federal Rules of Criminal Procedure.

With reference to Appellant's objections to the sufficiency of the instructions relating to reasonable doubt, character testimony, and definition of inadequacy of the books (Sections 1A, 1B and 1E of Appellant's Opening Brief), no objections were made in the trial court (See Appendix). Appellant respectfully urges that as to each

of these matters, "plain error" within the meaning of Rule 52b of the Federal Rules of Criminal Procedure was committed by the trial court.

It is the duty of the trial judge to charge the jury on all essential questions of law whether requested or not. *Morris v. United States*, 156 F. 2d 525. The failure of the trial court to give instructions on essential points of law is plain error which may be noticed even in the absence of an exception. *Schino v. United States*, 209 F. 2d 67. Likewise, an erroneous instruction affecting the substantial rights of a defendant has been held to constitute plain error and may constitute grounds of reversal on appeal even though no objection was made to the erroneous instruction in the trial court. *Bloch v. United States*, 221 F. 2d 786.

Whether or not instructions, be they given or refused constitute plain error, require the reviewing court to consider all of the instructions given on the subject matter under inquiry in any given case. In *Herzog v. United States*, 226 F. 2d 561, on rehearing *en banc*, 235 F. 2d 664, this court in speaking of the problem of determining this question used the following language which, we think, is particularly applicable to this case: "In determining whether the giving or failure to give an instruction warrants a reversal the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in the light of the factual situation disclosed by the record. Such is the course followed even in the normal criminal case, where the accused has preserved his right of review by timely and appropriate objection on the trial."

In this case, without repeating the substance of the points discussed in Appellant's Opening Brief, the Ap-

pellant respectfully urges that errors occurred in instructing the jury in not one applicable subject of law but in five. They are (1) the subject of reasonable doubt (Appellant's Opening Brief, page 4); (2) the subject of character witnesses (Appellant's Opening Brief, page 6); (3) the subject of cautionary instructions (Appellant's Opening Brief, page 8); (4) the subject of instructions with reference to the net worth method (Appellant's Opening Brief, page 11); and (5) the subject of instructions with reference to the adequacy of the Defendant's books (Appellant's Opening Brief, page 14).

Appellee suggests that some of the errors complained of, if erroneous at all, are harmless errors, and that, therefore, the judgment of conviction should be affirmed.

In *Bihn v. United States*, 328 U. S. 633, 66 Sup. Ct. 1172, 90 L. Ed. 1485, the Supreme Court in quoting from *McCandless v. United States*, 298 U. S. 342, used the following language: "An erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial." It would, therefore, appear to be the rule that all error which is found in a record is presumptively prejudicial error unless it affirmatively appears to the court that the error was not prejudicial. Assuming (but not conceding, however) that some of the errors complained of, if they stood alone, would be harmless error only, Appellant respectfully submits that a number of individual harmless errors in a record may well in their cumulative effect constitute plain error affecting the substantial rights of a defendant. Whether or not error in any given case is harmless or plain error as respects the substantial rights of the defendant is a matter of judgment transcending confinement by any for-

mula or precise rule. *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557. The true test is what affect the errors may reasonably have had upon a jury's decision. *United States v. Donnelly*, 179 F. 2d 227. It is, we think, perfectly proper for a reviewing court to declare an isolated instance of error as harmless and yet hold that numerous instances of individual harmless errors had the cumulative effect of plain error.

Conclusion.

For the reasons heretofore stated, it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

MAURICE J. HINDIN,

Attorney for Appellant.

APPENDIX.

I.

Specifications of Error.

Appellant specifies as error the following:

1. The Court Erroneously Instructed the Jury and Failed to Adequately Instruct the Jury as to the Law of the Case, and the Instructions Given to the Jury, Taken All Together, Gave an Incomplete and Erroneous Statement of the Law of the Case Which Constituted Prejudicial Error.

and in connection therewith specifies as error specifically the following:

- A. THE COURT'S INSTRUCTIONS WERE INADEQUATE AS TO "REASONABLE DOUBT." THE COURT'S INSTRUCTIONS ON REASONABLE DOUBT ARE NUMBERED

7 [Tr. R. p. 326]
10 [Tr. R. p. 328]
11 [Tr. R. p. 328]
12 [Tr. R. p. 328]
13 [Tr. R. p. 329]

Some reference to reasonable doubt is also found in instruction Number 45 [Tr. R. p. 345]. No objections were made at time of trial to any of these instructions. Each of these instructions is set forth *totidem verbis* in the next section of the Appendix to this brief.

- B. THE COURT'S INSTRUCTION WAS INADEQUATE AS TO THE EFFECT OF USE OF "CHARACTER WITNESSES."

The only instruction given on this subject was numbered 49 [Tr. R. p. 346]. It is set forth *totidem*

verbis in the next section of the Appendix to this brief. No objection to this instruction was made at time of trial.

C. THE COURT REFUSED TO GIVE REQUESTED CAUTIONARY INSTRUCTIONS.

Defendant requested instruction Numbered C [Tr. R. pp. 7-8]. The court refused to give this instruction, and Defendant made objections thereto [Tr. R. p. 354]. The instruction is set forth *totidem verbis* in Section III of the Appendix to this brief. The objections made are also set forth in Section IV of the Appendix to this brief.

D. THE COURT'S INSTRUCTIONS REGARDING THE "NET WORTH METHOD" WERE INSUFFICIENT AND INACCURATE.

The court gave instructions Numbered 26 and 27 [Tr. R. pp. 336-338] on the net worth method.

Instructions 26 and 27 are set forth *totidem verbis* in Section III of this Appendix to the brief.

Defendant made objections thereto [Tr. R. p. 356], and such objections are set forth in Section IV of the Appendix to this brief.

E. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE ADEQUACY OF THE DEFENDANT'S BOOKS.

The Court's Instructions Nos. 26 and 30 made reference to the subject of the inadequacy of the defendant's books [Tr. R. pp. 336 and 339]. These instructions are set forth *totidem verbis* in the next section of this Appendix. Defendant objected to In-

struction 26 [Tr. R. p. 356] but did not object to Instruction No. 30.

The objections made to Instruction 26 are noted in full in Section IV of this Appendix.

F. THE COURT ERRED IN REFUSING TO GIVE INSTRUCTIONS B AND C REQUESTED BY THE DEFENDANT.

Defendant's requested Instructions B and C [Tr. R. p. 354] were refused by the court. These instructions are set forth *totidem verbis* in Section III of this Appendix. The defendant's objections are noted in full in Section IV of this Appendix.

2. The Court Erred in Admitting in Evidence an Affidavit of the Defendant Referred to as "Government's Exhibit 32" [Tr. R. p. 209].

The affidavit is set forth in full in Section V of the Appendix hereto. The objections made thereto at time of trial are also noted in full in Section V of the Appendix hereto.

II.

Instructions Given, to Which Reference Is Made in Briefs.

No. 7

To the two charges or counts set forth in the information the defendant, upon his arraignment, pleaded "not guilty" to each count, thus putting in issue every material allegation contained in each of the two counts in the information, and it therefore becomes necessary for the prosecution to establish each and every one and all such allegations beyond all reasonable doubt. [Tr. R. p. 326.]

No. 10

You are instructed that the defendant is presumed to be innocent and that the presumption of innocence attends him to the end of the trial, or until the verdict is reached, and will prevail, unless it is overcome by evidence which convinces the jury beyond a reasonable doubt of his guilt. [Tr. R. p. 328.]

No. 11

You are instructed that the rule of law which throws around the defendant the presumption of innocence and requires the government to establish, beyond a reasonable doubt, every material fact averred in the information, is not intended to shield those who are actually guilty from just and merited punishment, but it is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime. [Tr. R. p. 328.]

No. 12

A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such doubt as would govern or control a person in the more weighty affairs of life.

If the minds of the jurors, after the entire comparison and consideration of all evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charges in a count of the information, there is not a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation. [Tr. R. p. 328.]

No. 13

You are to consider only the evidence introduced in this case. A conviction is justified only when such evidence excludes all reasonable doubt, as the same has been defined to you, without it being restated or repeated. You are to understand that the requirements that a defendant's guilt be shown beyond a reasonable doubt should be considered in connection with and as accompanying all the instructions that are given to you. [Tr. R. p. 329.]

No. 26

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the methods of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

The government is authorized by law, if the books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has been undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

If, at the end of a year, a man owns more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by gift or inheritance or loan, it may be inferred that it was part of taxable income. [Tr. R. p. 336.]

No. 27

The government has placed before you evidence relating to the net worth of Raymond and Mossie Percifield at the end of each of the years 1947 to 1949, inclusive. A defendant's net worth for a given year is the difference between his assets and liabilities, and increase in net worth for a year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute a defendant's taxable net income by the net worth method, you should subtract from the increase in net worth for any given year any non-taxable funds received during the year and then add the defendant's non-deductible expenditures for that year which would, of course, include his living expenses and the income taxes paid during the year. These expenditures are added in order to compute net income because they are not represented in the assets which the defendant has accumulated during the year and they are nondeductible expenses. If you find that the defendant had an increase in net worth for the years 1948 or 1949, and also had a business or calling of a lucrative nature, there is evidence that the defendant had net income for that year and if the amount exceeds exemptions and deductions, then that income is taxable. [Tr. R. p. 337.]

No. 30

Where a taxpayer's records are inadequate or inaccurate in substantial respect, it is proper to determine tax-

able income (1) by the net worth and expenditures method, (2) or by the bank deposits and cash expenditures method, (3) or both.

Of course, the government does not have to prove the exact amounts of unreported income. To require a meticulous degree of proof in a case of the present sort would be tantamount to holding that skillful concealment is an invincible barrier to proof. [Tr. R. p. 339.]

No. 45

Evidence is of two kinds, direct and circumstantial. Direct evidence is that evidence which is given when a witness testifies directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances from which this jury may infer other and connecting facts, which usually and reasonably follow. Crimes may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence taken as a whole must be consistent with each other, and with the guilt of the defendant and inconsistent with any reasonable theory of the defendant's innocence.

In the case of circumstantial evidence it is not necessary that the proof shall be conclusive. It is sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubt in their minds as to his guilt. If the jury believe the facts as shown by the evidence in this case, as to either count, are all consistent with the supposition that the defendant is guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty of that count; but if the jury do not so believe, they should find the defendant not guilty of that

count. All that can be required is not absolute and positive proof, but such proof as convinces the jury that the [365] crime has been made out against the accused beyond a reasonable doubt. [Tr. R. p. 344.]

No. 49

You are instructed, that some evidence has been received as to the character of the defendant. You will give to this evidence of good character such weight as you think it is entitled to receive and if after a consideration of all the evidence, facts, and circumstances in the case, including the evidence of good character, you have a reasonable doubt as to whether the defendant is guilty or innocent, then it will be your duty to find the defendant not guilty. [Tr. R. p. 346.]

III.

Instructions Requested by Defendant but Refused by the Court.

Instruction B

You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the defendant on a given date, followed by proof of a greater net worth on a later date, does not mean that the difference between the two amounts is income.

See generally: *Smith v. U. S.*, 348 U. S. 147.

Refused: Covered by No. 26 and No. 27. [Tr. R. p. 7.]

Instruction C

Ladies and gentlemen of the jury it is my duty to say to you that the conclusion has been reached from experi-

ence that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows: Take all of the assets of the taxpayer on a given date which would include all tangible property, cash on hand or in banks, securities, and accounts receivable from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of assets and liabilities and deduct the result thereof from the net worth at the beginning of the period, and the difference would be income but there may be sources which increase net worth that are not taxable and would not be considered income.

See generally: 99 L. ed. 170.

Refused: Covered by No. 26 and No. 27. [Tr. R. p. 7.]

IV.

Proceedings in Trial Court on Objections to Instructions. Verbatim from Transcript of Record,
Pages 353 to 358.

In Chambers—3:55 P.M.

Defendant present and defendant's counsel and government counsel present.

The Court: Let the record show that, pursuant to statement made in open court, we are meeting in chambers for the purpose of receiving counsel's objections to the instructions as given by the Court to the jury. Let the record show the presence of the defendant and his counsel and counsel for the government, and that the record is being made outside the presence of the jury.

Now, gentlemen, I think we will start with the plaintiff's case, and you can numerically make such objections as you see fit for the record.

Mr. Maxwell: Your Honor please, we accept the instructions as given and we wish to interpose no objections to the instructions as given.

The Court: Let the record so show. Now counsel for the defendant, you make any objections you have is the record as to your instructions, which are 7 in number and labeled A to G. We might let the record show that plaintiff's offered instructions were numbered 1 to 32, inclusive. You may proceed. [377]

Mr. Puccinelli: May it please the Court, we except to the Court's refusal to give defendant's requested instruction B, as it is a correct statement of the law and is not covered by any other instruction given by the Court.

Defendant's Requested Instruction B

You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the defendant on a given date, followed by proof of a greater worth on a later date, does not mean that the difference between the amounts is income.

We except to the Court's refusal to give defendant's requested Instruction C, as it is a correct statement of the law and is not covered by any other instruction of the Court.

Defendant's Requested Instruction C

Ladies and gentlemen of the jury, it is my duty to say to you that the conclusion reached from experience that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the Court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth [378] cases in the full realization that the taxpayer may be ensared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows—take all of the assets

of the taxpayer on a given date, which would include all tangible property, cash on hand or in bank account, securities, an accounts receivable, from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of assets and liabilities and deduct the result thereof from the net worth of the beginning of the period, and the difference could be income but there may be sources which increase net worth that are not taxable and would not be considered income.

We except to Instruction No. 8 as given, because it is not the law it is argumentative and uncertain and irrelevant.

We except to Instruction No. 14, because it is indefinite, misleading and lays down a rule that permits the conviction of the defendant for a felony under Section 145(b) on evidence [379] proving, or tending to prove a misdemeanor under Section 145(a).

We except to Instruction No. 17, because it would permit the conviction of the defendant under Section 145(b) on proof of violation of Section 145(a), and does not require the wilful attempt to evade taxes to be proved by independent evidence.

We except to Instruction No. 20, as it acts to modify defendant's requested Instruction D, in that the modification nullifies the request and by the modification the independent evidence to prove the wilfullness in the request is nullified. In other words, it does not require independent proof of wilfullness.

We except to Instruction No. 26, because it is not a correct statement of the law and is indefinite, confusing and misleading.

We except to Instruction No. 27, because it is not a correct statement of the law, and is indefinite, uncertain and misleading.

We except to Instruction No. 29, because it is not a correct statement of the law and is not adjusted to the evidence in this case and the government proceeded in this case under a hybrid method, and therefore is confusing and misleading.

We except to Instruction No. 37 because it is not adjusted to the evidence in this case, it is misleading and allows the jury to convict on evidence establishing nothing more than a [380] misdemeanor, and is in conflict with other instructions requiring proof by independent evidence of wilfullness and in conflict with Instruction No. 38.

We except to Instruction No. 38 because it tends to modify defendant's requested Instruction E, since it in effect destroys the full force and effect of the request, and is not adjusted to the evidence in this case as presented, as modified, and is confusing and misleading.

Defendant's Requested Instruction E

In this case you are instructed that you cannot infer evil motive because of the failure of the defendant to make a full and complete disclosure to the government agents when asked as to his financial transactions.

We except to Instruction No. 39, as it modifies defendant's requested Instruction F, since it eliminates therein phrases and words in the law as are contained in defendant's requested Instruction F.

Defendant's Requested Instruction F

You are instructed that the filing of a return by defendant which understates his true income is unlawful only if made wilfully, with knowledge of its falseness and

with intent to evade income taxes, and there is no presumption that may be drawn from the act itself, and both knowledge and wilfulness must be established by independent proof.

We except to Instruction No. 19 as given and as modifying defendant's requested Instruction G, as defendant's request correctly stated the law and by modifying it, renders it conflicting and confusing and indefinite and the modification destroys the force and effect of the request.

Defendant's Requested Instruction G

Wilfully means knowingly, with a bad heart and a bad intent. It means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid or careless, negligent or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He certainly is not wilful if he acts without the advice of a lawyer or accountant, for there is not requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.

The Court: Gentlemen, do you stipulate that the proceedings had here and now have the same force and effect as though had in open court?

Mr. Maxwell: So stipulated.

Mr. Pucinelli: So stipulated.

The Court: Let the record show all exceptions denied.

(Jury retired at 4:07 p.m.) [383]

V.

Proceedings in Trial Court Relative to Plaintiff's Exhibit 32 Taken From Transcript of Record, Page 208 to Page 210.

Q. You have handed me the affidavit which you have referred to [199] in your previous testimony here? A. Yes, sir.

Mr. Maxwell: I offer this in evidence as government's next in order.

The Court: No. 32.

Mr. Anderson: We object to this exhibit or affidavit on the following grounds: That there is no evidence of any warning at the time of signing this purported affidavit that it would be used against the defendant in the event of a criminal prosecution, that the witness' evidence shows that it was not given freely and voluntarily, and upon the further ground that the purported document includes income from gambling for 1948, 1949 and 1950, without any segregation as to what the amount was in any year.

The Court: The objection is overruled on every ground. The offer is now received in evidence as government's Exhibit 32.

PLAINTIFF'S EXHIBIT No. 32

Affidavit

State of Colorado,
County of Rio Blanco—ss.

Raymond S. Percifield, being first duly sworn, on oath, depose and says:

1. That he is Raymond S. Percifield, the owner and operator of the Ace High Bar and Cafe in Rangely, Colorado, and is a resident of Rio Blanco County, Colorado.

2. That during the calendar years 1948, 1949 and 1950 he neglected to show all income on income tax re-

turns, form 1040, and attached schedules thereto, and that during those years he received personal income in excess of \$36,000.00, part of which additional income is reflected by payments on one certain promissory note given by this affiant as part of the purchase price of the Ace High Bar and Cafe.

3. That the additional income which was not reported during those three years was obtained from gambling in the States of Colorado, Utah, Wyoming, Montana and Nevada.

4. That this affiant failed to report income received from gambling enterprises during the above years, through ignorance of the requirements of the Internal Revenue Code in that connection, and he is willing at this time to pay all taxes and penalties properly assessable against him in that connection, and states that at no time did he intend to violate any of the provisions of the internal Revenue Code or defraud the United States Government.

5. That this Affidavit is given voluntarily at the request of James W. Bell, Acting Special Agent, United States Treasury Department, and Michael E. Thomas, Internal Revenue Agent, United States Treasury Department.

6. Further Affiant sayeth not.

Witness my hand and seal this 1st day of October, A.D. 1952.

RAYMOND S. PERCIFIELD.

Subscribed and sworn to before me this 1st day of October, A.D. 1952, by Raymond S. Percifield.

[Seal]

ROBERT D. WHITE,

Notary Public.

My commission expires June 4, 1955.

No. 15123

United States
Court of Appeals
for the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of
Robert Sidebotham, Deceased, and ROBERT
SIDEBOTHAM AND JAMES SIDE-
BOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

W. A. ROBISON, Administrator of the Estate of
Robert Sidebotham, Deceased, and FRANK J.
FONTES and DELGER TROWBRIDGE, His
Attorneys,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Northern District of California,
Southern Division.

FILED

SEP -5 1956

No. 15123

United States
Court of Appeals
for the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of
Robert Sidebotham, Deceased, and ROBERT
SIDEBOTHAM AND JAMES SIDE-
BOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

W. A. ROBISON, Administrator of the Estate of
Robert Sidebotham, Deceased, and FRANK J.
FONTES and DELGER TROWBRIDGE, His
Attorneys,

Appellants.

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amendment to Answer of Defendants	30
Amendment to Answer of W. A. Robison, Robert and James Sidebotham	31
Answer of W. A. Robison to Third Amended Complaint as Amended	16
Answer of Robert and James Sidebotham to Third Amended Complaint	22
Appeal Bond on Judgment	57
Appeal Bond on Order	59
Attorneys, Names and Addresses of	1
Certificate of Clerk to Record on Appeal	239
Complaint, Second Amended	3
Ex. A—Description of Property	8
Complaint, Third Amended	9
Findings of Fact and Conclusions of Law	42
First Amendment to Third Complaint	15
Judgment	48
Memorandum Opinion	33
Notice of Appeal From Judgment	56
Notice of Appeal From Order Denying Allow- ance of Expenses, Etc.	57

INDEX	PAGE
Order Denying Petition for Allowance of Expenses, Etc.	55
Petition of Public Administrator and of His Attorneys for Allowance of Expenses, Etc. . .	50
Statement of Points Upon Appeal	242
Transcript of Proceedings	60
Witnesses :	
Byrne, Daniel J.	
—direct	128
—cross	144
Fontes, Frank J.	
—direct	149, 167
—cross	190
—redirect	193
Krout, J. E.	
—direct	213
Monell, Theodore M.	
—direct	233
Scardino, Joseph	
—direct	207
Schneider, Sam A.	
—direct	195
Sidebotham, Helen (Madeline) Marceau	
—direct	74, 83
—cross	85, 110
—redirect	113, 118, 126
—recross	117, 122

NAMES AND ADDRESSES OF COUNSEL

THEODORE M. MONELL,
1085 Mills Building,
San Francisco, California;

DELGER TROWBRIDGE,
819 A Street,
San Rafael, California,
Counsel for Appellants.

MANUEL RUIZ, JR.,
704 South Spring Street,
Los Angeles, California,
Counsel for Appellee.

In the United States District Court in and for the
Southern Division of the Northern District of
California

No. 32531

HELENE MARCEAU SIDEBOTHAM,

Plaintiff,

vs.

PHIL C. KATZ, Administrator of the Estate of
Robert Sidebotham, Deceased, et al.,

Defendants.

SECOND AMENDED COMPLAINT, QUIET
TITLE ACCOUNTING AND INJUNCTION

Comes now, the plaintiff, and for cause of action
alleges, as follows:

I.

That Robert Sidebotham died intestate on December 21, 1951. At said time he was in possession and control of certain property, description of which is set forth in Exhibit "A" attached hereto as *tho* more particularly set forth herein. That he was likewise in possession and control of additional property, nature and extent of which property is unknown to this plaintiff, and as soon as the same is ascertained, plaintiff will ask leave of Court to insert the same by way of amendment.

II.

That said property, upon decedent's death, passed from the control, possession and management of

decedent, to Phil C. Katz, as his personal representative, and to the present successor of said representative, to wit, W. L. Robison, the duly qualified and acting administrator of the Estate of Robert Sidebotham, deceased.

III.

That at the time of the death of said Robert Sidebotham, plaintiff and said decedent were tenants in common of said property and each of them was an owner of an undivided one-half of said property. That since the death of said Robert Sidebotham, plaintiff has continued to own an undivided one-half of said property, as her separate estate.

IV.

That said administrator has since December 21, 1951, repudiated said cotenancy, and refuses plaintiff both the right of possession and beneficial enjoyment of her share thereof as well as the right to an accounting as to the rents and profits appertaining thereto. That said repudiation is without right, and said defendant has no right, title, interest or estate in or to plaintiff's one-half of said cotenancy, either as administrator, or otherwise.

V.

That defendants Robert Sidebotham and James Sidebotham, are persons who claim said property herein referred to, to be and constitute the sole and separate estate of the decedent, and claim the same

as heirs at law of decedent, to the exclusion of plaintiff.

VI.

That Does I to V are ancillary administrators of the Estate of Robert Sidebotham, deceased, and are in the possession of property, all of which at the time of decedent's death, constituted property owned in common by plaintiff and decedent as hereinabove set forth. That the true names of said ancillary administrators will be inserted by amendment, when ascertained as well as a specification of property in their possession so held in cotenancy.

VII.

That defendants Richard Roe I to V and Jane Doe I to V, are corporation, copartnership, fiduciaries, banks, principals, and agents, of said decedent, whose true names are not at this time, known to plaintiff. That said defendants are in the possession of assets, contracts, accounts, beneficial interests, claims, demands, choses in action, including credits and equities, all of which at the time of decedent's death was owned in common by said decedent and plaintiff, and to which, to the extent of an undivided one-half thereof plaintiff has the right of immediate possession.

That by virtue of the fact that said defendants are in the possession and control of said property and assets, they are in a position to divert the same and to hide and conceal the same, to the irreparable damage and injury of plaintiff who has no

speedy or adequate remedy at law, to protect her rights.

That as soon as the true names and the identity of said defendants are ascertained, plaintiff will ask leave of Court to insert the same herein by amendment.

By Way of Further and Second Cause of Action
Plaintiff Alleges as Follows:

I.

Refers to paragraphs I to VII, inclusive, of the first cause of action and repleads the same as though more particularly set forth herein.

II.

That plaintiff at all times herein mentioned has been the owner and entitled to the possession of an undivided 50% of the assets, property, both real and personal as well as the fruits and increase thereof which decedent possessed at the time of his demise.

Wherefore, Plaintiff Prays for Judgment as Follows:

That a writ of mandamus or mandatory injunction, or other proper order, issue, requiring defendants and each of them, their agents and representatives, to account for all monies, assets, and property in their possession, held for and to the account of the Estate of Robert Sidebotham, deceased, or his alleged heirs at law: and that they and each of them

be restrained from paying out further funds or delivering assets or other monies or properties, to third parties.

That defendants, and each of them be ordered to account for all monies, assets, and properties, in their possession, held for and to the account of the Estate of Robert Sidebotham, deceased, or his alleged heirs at law.

That the defendants, and each of them, be required to set forth the nature of their claims to said monies, assets, and property and all adverse claims of the defendant be determined by a decree of this Court, and that by said decree it be declared and adjusted that the defendants have no interest or estate whatsoever, and the assets accounted for to the extent of an undivided one-half thereof.

That it be decreed that plaintiff is the owner and entitled to the possession of an undivided half of the assets, monies and property, constituting the Estate of Robert Sidebotham, deceased.

For costs.

/s/ MANUEL RUIZ, JR.,
Attorney for Plaintiff.

EXHIBIT "A"

Contents of Safety Deposit Box at the American Trust Company in San Fran- cisco containing the sum of.....	\$64,770.00
Postal certificate account No. 9095.....	2,500.00
Redemption of twenty 50-cent U. S. War Savings Stamps	5.00
Mr. Kerner, payment acct. of stock sold prior to death.....	400.00
Bank of America (Day and Night).....	1,867.00
Bank of America (7th and Olive).....	1,120.79
Bank of America (Arguello and Geary). .	2,524.75
Merrill, Lynch, Pierce, Fenner & Beane, balance of brokerage account.....	792.10
Pacific National Bank.....	525.79
U. S. Postal Savings.....	560.12
Anglo-California National Bank.....	993.24
Eureka Federal Savings and Loan Asso- ciation	4,217.56
Personal property other than cash which consists of the following:	
White metal chain and white metal pen- dent, 5 white stones.....	300.00
1949 Lincoln Sedan, Engine No. 13 A7094	1,420.00
Shares of stock, 6 of El Vado Nevada Corporation, 2,000 of Inter-Provincial Oils, Ltd., 250 of Crescent Cities Prop- erties Company, 250 of Crescent Prop- erties Company	
One promissory note due to decedent at date of death from Harry L. Babb, 643 South Hill Street, Los Angeles.....	525.00

Real Estate in the City and County of San Francisco described: Beginning at a point on the N line of Geary Blvd., distant thereon 100 feet westerly from the westerly line of 14th Avenue; running thence westerly along the northerly line of Geary Blvd. 27 feet 6 inches; thence at a right angle northerly 100 feet; thence at a right angle easterly 27 feet 6 inches; and thence at a right angle southerly 100 feet to the point of the beginning. Being a portion of Block 1446, lot number 25, Improved 30,000.00

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

THIRD AMENDED COMPLAINT, QUIET
TITLE ACCOUNTING AND INJUNCTION

Comes now the plaintiff, and prior to answer of the defendant, files her Third Amended Complaint, and for cause of action alleges as follows:

I.

She refers to paragraphs I to VII, inclusive, of her first cause of action, as contained in her second amended complaint to quiet title, accounting and

injunction, and repleads the same as though more particularly set forth herein, by reference.

II.

She refers to paragraphs I and II of her second cause of action, as contained in her second amended complaint to quiet title, accounting and injunction, and repleads the same as though more particularly set forth herein, by reference.

By Way of Further and Third Cause of Action,
Plaintiff Alleges as Follows:

I.

That since the death of Robert Sidebotham, on December 21, 1951, she, as an aggrieved party, has discovered the following facts constituting fraud as against her, which fraud proximately occasioned her to suffer a grievous mistake, from which she desires relief.

II.

That she was married to decedent, Robert Sidebotham, on January 1, 1927. That she divorced Robert Sidebotham on November 14, 1946, in the State of Nevada by substituted service.

III.

That during the year 1938, and at a time that said Robert Sidebotham was sentenced to jail, for failure to report a real estate subdividing scheme to the State Real Estate Commission, he borrowed the sum of one hundred dollars (\$100.00) from

plaintiff, and told her that as soon as he made some money he would pay her back. That thereafter, and until the middle of the year of 1940, he frequently saw plaintiff, and always informed her that he was broke, but would occasionally give her rent and food money. That said Robert Sidebotham never did inform plaintiff that he had made any money, never paid her back said sum of \$100.00, and verily believed that he continued "broke."

IV.

That at the time of the death of said Robert Sidebotham, certain assets were found in his possession, under the following aliases, to wit: W. H. Towner, William Towner, George W. Thompson, George R. Stone, Russell Robert Smith, George William Smith, Russell R. Smith, R. R. Smith, W. H. Jackson, Edward W. Hutton, Edward Hutton, E. W. Hutton, George W. Fenton, George William Brown, George W. Anderson, Edward W. Sideboth, and several combinations of the name of Sidebotham.

That the property and assets so found in his possession under said names, is the same property which passed from the decedent's control, and management to Phil C. Katz, as his personal representative, and to the present successor of said representative, to wit: W. L. Robinson, the duly qualified and acting administrator of the Estate of Robert Sidebotha, deceased, and referred to in paragraph I of plaintiff's first cause of action. That the description

thereof is more particularly described in Exhibit "A" therein mentioned, and is pleaded herein and made a part hereof, as though set forth with particularity.

V.

That one of the reasons and purposes which said decedent had in so hiding his assets was to prevent plaintiff from sharing in acquests and gains during her marriage to him, and to cheat her of her interest therein, as his wife, and deprive her thereof. That the property hereinabove referred to constituted property acquired and accumulated by decedent Robert Sidebotham during the marriage of the parties as well as the fruits and increase thereof.

VI.

That after the year 1940 and during the year 1941 decedent refused to further cohabit with plaintiff, wrongfully and without cause, and thereafter remained away from her, and she did not know his whereabouts. That in the month of November, 1946, plaintiff procured a divorce from Robert Sidebotham in the State of Nevada on substituted service. When questioned by her attorney, whether there was any community property, she answered that she did not know. That said attorney, unbeknownst to plaintiff, nevertheless framed a formal pleading wherein it was stated that there was no community property. That plaintiff did not read the same but at the hearing of the action, wherein a divorce was granted to plaintiff, she did not tes-

tify concerning the existence or non-existence of property of the marriage.

VII.

That said Court did not dispose of the property rights of the parties, nor did it make an order concerning property, and there was no evidence submitted to the Court concerning the same, but the Court found nevertheless that the allegations of the complaint were true and sustained by the evidence. That the finding aforesaid was arbitrary and capricious, and the Court lacked the power and jurisdiction accordingly to make the same, since there was no evidence submitted on the subject whatsoever.

VIII.

That plaintiff seeks relief from her mistake and the estoppel which would otherwise apply, but for said mistake, in that an adjudication that there was no community property, under the facts hereinabove set forth, would result in great and irreparable damage and be contrary to all principles of justice. That the presumption of law to the effect that Robert Sidebotham admitted all of the facts which were pleaded in the Nevada Judgment, by reason of lack of personal service upon him, is a fiction which this Court of Equity ought weigh against the misconduct of said Robert Sidebotham in having actively concealed assets and property as hereinabove specified, which, under the law, plaintiff had an equal and vested interest with him. That plaintiff first discovered that she had signed the formal pleading

containing the sentence that there was no community property, referred to in paragraph VI hereinabove, after the institution of this case at bar, when her attorney, Manuel Ruiz, Jr., informed her of the same, on July 13th, 1953, said attorney having been on the same day so advised by the attorneys for the defendants.

Wherefore Plaintiff prays for judgment as follows:

That a writ of mandamus or mandatory injunction, or other proper order, issue, requiring defendants and each of them, their agents and representatives, to account for all monies, assets, and property in their possession, held for and to the account of the Estate of Robert Sidebotham, deceased, or his personal representative, or his alleged heirs at law; and that they and each of them be restrained from paying out further funds or delivering assets or other monies or properties, to third parties.

That defendants, and each of them be ordered to account for all monies, assets and properties in their possession held for and to the account of the Estate of Robert Sidebotham, deceased, his personal representative or heirs at law.

That the defendants, and each of them, be required to set forth the nature of their claims to said monies, assets, and property and all adverse claims of the defendant be determined by a decree of this Court, and that by said decree it be declared and

adjudicated that the defendants have no interest or estate whatsoever therein, and the assets accounted for to the extent of an undivided one-half thereof.

That the Court relieve plaintiff from any estoppel or mistake proximately resulting from the fraudulent conduct of concealment of said Robert Sidebotham concerning her property rights.

That it be decreed that plaintiff is the owner and entitled to the possession of an undivided half of the assets, monies and property, constituting the Estate of Robert Sidebotham, deceased.

For costs.

/s/ MANUEL RUIZ, JR.,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed August 6, 1953.

[Title of District Court and Cause.]

FIRST AMENDMENT TO THIRD AMENDED COMPLAINT

Comes Now the plaintiff, before answer filed, served and entered, and files her first amendment to her Third Amended Complaint, and alleges as follows:

I.

Refers to paragraph II of her Third Amended Complaint, and omits and strikes the same, and in stead and in place thereof alleges as follows:

II.

That she was married to the decedent, Robert Sidebotham, in the City of Tijuana, Lower California, Mexico, on May 30th, 1928. That she divorced Robert Sidebotham on November 14th, 1946, in the State of Nevada by substituted service.

/s/ MANUEL RUIZ, JR.,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 23, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT W. A. ROBISON,
ADMINISTRATOR OF THE ESTATE OF
ROBERT SIDEBOTHAM, DECEASED, TO
THE THIRD AMENDED COMPLAINT AS
AMENDED

Comes now the defendant, W. A. Robison, Administrator of the estate of Robert Sidebotham, deceased, and by way of answer to the third amended complaint as amended admits, denies and alleges as follows, to wit:

First Defense

The third amended complaint as amended fails to state a claim against this defendant on which relief can be granted.

Second Defense

I.

Said defendant is without knowledge or information sufficient to form a belief as to the truth of paragraph I of said third amended complaint as amended, except that he admits paragraphs I, II and V of the first cause of action as contained in plaintiff's second amended complaint; said defendant also admits that he and Phil C. Katz, as the prior administrator of said estate, have repudiated any cotenancy of the plaintiff in said property since about October 10, 1952, when they first heard of said claim of cotenancy of said plaintiff, and this defendant refuses the plaintiff any right of possession and beneficial or beneficial enjoyment of her share thereof, as well as any right to an accounting as to the rents and profits or profits appertaining thereto.

II.

Answering plaintiff's second cause of action (denominated II in said third amended complaint as amended), said defendant incorporates herein his answer to the first cause of action (denominated I in said third amended complaint as amended) herein by reference, and repleads the same as though set forth in full herein.

III.

Said plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, II, III and V of plaintiff's third cause of action set forth in

her third amended complaint as amended, except that he admits that plaintiff divorced Robert Sidebotham on November 14, 1946, in the State of Nevada by substituted service.

IV.

Plaintiff admits paragraph IV of the third cause of action of plaintiff's third amended complaint as amended except that he denies that certain assets were found in the possession of Robert Sidebotham at the time of his death under all of the aliases alleged in said paragraph, and in this behalf he alleges that most of his assets were in the name of Sidebotham with various combinations of his given names and initials.

V.

Said defendant is without knowledge or information sufficient to form a belief as to the truth of paragraph VI of the second cause of action except that he admits that during the year 1941 and thereafter said Robert Sidebotham remained away from plaintiff and that she did not know his whereabouts. He also admits that in the month of November, 1946, plaintiff procured a divorce from Robert Sidebotham in the State of Nevada on substituted service. Said defendant further admits that plaintiff's attorney in Nevada framed a formal pleading, to wit, a complaint for divorce, wherein it was stated that there was no community property.

VI.

Answering paragraph VII of said third amended complaint as amended, said defendant alleges that

he is without knowledge or information sufficient to form a belief as to the truth thereof but admits that the court in Nevada found that the allegations of the complaint were true and sustained by the evidence.

Third Defense

I.

That the three causes of action alleged in plaintiff's third amended complaint as amended are and each of them is barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure of the State of California.

II.

That the three causes of action contained in plaintiff's third amended complaint as amended are and each of them is barred by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure of the State of California.

III.

That the three causes of action contained in plaintiff's third amended complaint as amended are and each of them is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

IV.

That the three causes of action set forth in plaintiff's third amended complaint as amended are barred by plaintiff's laches, which has been and is prejudicial to said defendant by reason of:

(a) The death of Robert Sidebotham, deceased, and the inability to locate important witnesses and vital written evidence which has occurred by reason of the death of said Robert Sidebotham, deceased, which has irretrievably damaged the defense of this suit.

(b) The lapse of over eleven years since the separation of plaintiff from Robert Sidebotham, now deceased, and since he failed to give her any support, as the result of which delay many witnesses important to the defense have disappeared and much written evidence vital to the defense has been irretrievably lost.

Fourth Defense

That on the 14th day of November, 1946, at Carson City, Nevada, in an action then pending in the First Judicial District Court of the State of Nevada, in and for the County of Ormsby, between Madeline Sidebotham, plaintiff, who is also the plaintiff, herein, and Robert Russell Sidebotham, defendant, in which the plaintiff sued said defendant for a divorce, said court obtained judisdiction over defendant by service of summons by publication and mailing in the manner provided by the statutes of the State of Nevada; that plaintiff put in issue the question of whether there was any community property of the parties, she expressly alleging that there was no community property of the parties, and the court made an express finding that all of the allegations in the complaint were true; that by rea-

son thereof the very question sought to be litigated in this court has already been litigated by a court having jurisdiction of the subject matter and the defendant husband, and said question cannot now be litigated again.

Fifth Defense

Plaintiff is estopped to claim any portion of the estate of Robert Sidebotham, deceased, as community property, because on September 11, 1946, she caused a written complaint for divorce to be filed in the First Judicial District Court of the State of Nevada, in and for the County of Ormsby, against Robert Russell Sidebotham (now deceased, whose estate is now being sued by plaintiff herein), in which she alleged under oath that there was then no community property belonging to the parties to said suit. Plaintiff caused this complaint to be served on the defendant in a manner provided by the laws of the State of Nevada, and this defendant is informed and believes and therefore alleges that said Robert Russell Sidebotham relied on said allegation as to there not being any community property, and because of said reliance on said sworn statement of plaintiff failed and neglected to make any defense to said action and allowed plaintiff to obtain judgment in said action by default, although said defendant therein, as this defendant is informed and believes and therefore alleges, had ample grounds for successfully contesting and defeating plaintiff's said action. By reason of said facts plaintiff is estopped by her said conduct from

now contradicting her sworn statement that there was no community property of the parties when she divorced said Robert Russell Sidebotham as herein alleged.

Wherefore, said defendant prays that he may be dismissed hence with his costs of suit, and for such other and further relief as may be proper in the premises.

Dated: March 17, 1955.

/s/ DELGER TROWBRIDGE,

/s/ FRANK J. FONTES,

Attorneys for Defendant W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 18, 1955.

[Title of District Court and Cause.]

ANSWER TO THIRD AMENDED COMPLAINT AS AMENDED BY FIRST AMENDMENT THERETO

Come Now the defendants, Robert Sidebotham and James Sidebotham, and answering the third amended complaint as amended by the first amendment thereto, said defendants jointly and severally deny and allege the following:

I.

Answering the allegations contained in paragraphs I to VII of the first cause of action contained in the second amended complaint incorporated by reference in said third amended complaint, said defendants admit that Robert Sidebotham died intestate on December 21, 1951, and that these answering defendants claim the property referred to to be and constitute the sole and separate estate of said decedent and claim the same as heirs at law of said decedent to the exclusion of plaintiff.

Said defendants have no information or belief sufficient to enable them to answer the remaining allegations so incorporated by reference and on said ground deny, generally and specifically, each and every, all and singular, the allegations in said paragraphs I to VII of said first cause of action in the second amended complaint incorporated by reference in said third amended complaint not heretofore expressly admitted.

II.

Answering the allegations contained in paragraphs I and II of the second cause of action contained in said second amended complaint and incorporated by reference in said third amended complaint, said defendants hereby refer to paragraph I hereinbefore appearing and incorporate the allegations and denials therein contained by reference at this point, as if the same were fully recopied and set forth at length.

Said defendants further deny generally and specifically, each and every, all and singular, the allegations contained in paragraph II of said second cause of action contained in said second amended complaint incorporated by reference in said third amended complaint.

III.

Answering the allegations contained in the third cause of action contained in said third amended complaint as amended by the first amendment to the third amended complaint, said defendants have no information or belief sufficient to enable them to answer any of the allegations contained and referred to in said pleadings and on said ground deny, generally and specifically, each and every, all and singular, the allegations in said third cause of action in said third amended complaint and said first amendment to third amended complaint contained.

As and for a Second, Separate and Distinct Defense to each and every of the causes of action set forth and referred to in said third amended complaint as amended, said defendants, and each of them, jointly and severally allege that said third amended complaint as amended fails to state facts sufficient to constitute a cause of action against said defendants, or either of them.

As and for a Third, Separate and Distinct Defense to each of the causes of action attempted to be set forth by plaintiff herein, said defendants, and each of them, allege that each of said causes of action is barred by the provisions of subdivision 1 of

Section 337 of the Code of Civil Procedure of the State of California.

As and for a Fourth, Separate and distinct Defense to each of the causes of action attempted to be set forth by plaintiff herein, said defendants, and each of them, allege that each of said causes of action is barred by the provisions of subdivisions 3 and 4 of Section 338 of the Code of Civil Procedure of the State of California.

As and for a Fifth, Separate and Distinct Defense to each of the causes of action attempted to be set forth by plaintiff herein, said defendants, and each of them, allege that each of said causes of action is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

As and for a Sixth, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that each of the causes of action attempted to be set forth by plaintiff herein is barred by plaintiff's laches.

As and for a Seventh, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that each of the causes of action attempted to be set forth by plaintiff herein is barred by the laches of plaintiff for the following reasons:

(a) The death of said decedent and the inability to locate important witnesses and written evidence

which has occurred by reason of said death prevents said defendants from securing evidence which would enable them to present a defense otherwise available.

(b) That plaintiff has delayed over eleven years since her separation from said decedent in asserting her claims which she is herein attempting to allege and by reason of the delay of plaintiff, evidence otherwise available has become lost or destroyed.

(c) That it appears from the allegations of plaintiff's complaint that no investigation was made by her until after the death of Robert Sidebotham to ascertain whether he had any assets or even to assert any claim against him during his lifetime and by reason of such action of said plaintiff, the rights of said defendants have become prejudiced and destroyed.

As and for an Eighth, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that plaintiff herein commenced an action in the First Judicial District Court of the State of Nevada in and for the County of Ormsby, against decedent herein for a divorce, under which action said court obtained jurisdiction over defendant by constructive service, as provided by law and that in the complaint in said action, plaintiff herein as plaintiff in said action alleged under oath that there was no community property of the parties and the court in said action made an express finding that

all of the allegations in the complaint were true. That said decision has become final and no appeal was taken therefrom and it is now *res judicata* and finally determines that plaintiff herein had and has no rights to any of the property of said Robert Sidebotham.

As and for a Ninth, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that plaintiff is estopped from claiming any portion of the estate of Robert Sidebotham, deceased, for the reason that she caused a written complaint for divorce to be filed in the First Judicial District Court of the State of Nevada in and for the County of Ormsby against said Robert Russell Sidebotham, the decedent whose estate is now being sued herein, in which complaint plaintiff herein alleged as plaintiff therein, under oath, that there was then no community property belonging to the parties to said suit. That plaintiff caused a copy of said complaint to be served on defendant said decedent in the manner provided by the laws of the State of Nevada and said defendants are informed and believe and therefore allege that said defendant in said action relied upon the allegation of plaintiff herein in said complaint that there was no community property of himself and said plaintiff herein and because of said reliance on said sworn statement he failed and neglected to make or interpose any defense to said action, although said defendant had ample grounds for successfully con-

testing and defeating plaintiff's said action. That by reason of said facts, plaintiff is estopped by her conduct from contradicting her verified statement that there was no community property of the parties when she divorced said Robert Russell Sidebotham as herein alleged.

As and for a Tenth, Separate and Distinct Defense to each of the causes of action set forth by plaintiff herein, said defendants, and each of them, allege that plaintiff is estopped from claiming any portion of the estate of Robert Sidebotham, deceased, for the reason that she caused a written complaint for divorce to be filed in the First Judicial District Court of the State of Nevada, in and for the County of Ormsby against said Robert Russell Sidebotham, the decedent, whose estate is now being sued herein, in which complaint plaintiff herein alleged as plaintiff therein, under oath, that there was then no community property belonging to the parties to said suit. That plaintiff caused a copy of said complaint to be served on defendant, said decedent, in the manner provided by the laws of the State of Nevada and said defendants are informed and believe and therefore allege that said defendant in said action relied upon the allegation of plaintiff herein in said complaint that there was no community property of himself and plaintiff herein and because of said reliance on said sworn statement he failed and neglected to make or interpose any defense to said action, although said defendant had ample grounds for successfully con-

testing and defeating plaintiff's said action. That plaintiff herein, as plaintiff in said action in said Nevada court, obtained a judgment of said court which at said time had jurisdiction of the parties before it, to wit, said plaintiff herein and said Robert Russell Sidebotham, and in the findings in said matter said court found that all of the allegations in said complaint were true and a judgment was entered by said court in said matter in favor of the plaintiff and against said Robert Russell Sidebotham. That no appeal was taken from said judgment and the same has become final. That by reason of the foregoing plaintiff is now estopped by the judgment of said Nevada court from contending that there is any community property of said plaintiff and said defendant in said action or that plaintiff herein has any claim whatsoever against any of the assets or property of said Robert Sidebotham, deceased.

Wherefore, having fully answered said complaint, said defendants pray that plaintiff take nothing by her action herein and that they be henceforth dismissed, together with their costs of suit.

/s/ THEODORE M. MONELL,
Attorney for Defendants Robert Sidebotham and
James Sidebotham.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1955.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Leave of Court being first had and obtained, the defendants in the above-entitled matter filed this, their amendment to the answers heretofore filed by them herein, and allege the following:

As and for a Further, Separate and Distinct Defense, said defendants, and each of them, allege that on or about August 6, 1940, said decedent, Robert R. Sidebotham, commenced an action against plaintiff herein in the District Court of the Second Judicial District, County of Albany, in the State of Wyoming, for divorce on the ground of the wilful desertion by plaintiff herein (being the defendant in said action) of the said decedent, Robert R. Sidebotham. That thereafter in said action and after jurisdiction was lawfully obtained therein, said District Court of the Second Judicial District, County of Albany, State of Wyoming, rendered its decree on November 2, 1940, granting to said Robert R. Sidebotham a decree of absolute divorce from the defendant in said action, being the plaintiff herein, and dissolving and holding for naught the marriage contract theretofore entered into between said decedent and plaintiff herein. That no appeal was taken from said judgment and said judgment is final and valid and still in full force and effect.

That there was no community or other property of said decedent and plaintiff herein accumulated

or acquired after entry of said decree of divorce hereinbefore mentioned. That at the time of obtaining said divorce there was no community property existing in which plaintiff herein had any interest.

Wherefore, having fully answered said defendants pray that plaintiff take nothing by her action herein and that said defendants be hence dismissed, together with their costs of suit herein incurred.

/s/ FRANK J. FONTES,

/s/ DELGER TROWBRIDGE,

/s/ THEODORE M. MONELL,

Attorneys for Defendants.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed August 9, 1955.

[Title of District Court and Cause.]

AMENDMENT TO ANSWERS OF DEFENDANT W. A. ROBISON, ADMINISTRATOR OF THE ESTATE OF ROBERT SIDEBOTHAM, DECEASED, AND OF DEFENDANTS ROBERT SIDEBOTHAM AND JAMES SIDEBOTHAM

Come now the defendants, W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased; Robert Sidebotham and James Sidebotham, and each of them hereby amends his answer to the third amended complaint as follows:

For a Further Separate and Sixth Defense, said defendants, and each of them, allege that on the 10th day of December, 1953, in a proceeding then pending in the Superior Court of the State of California in and for the City and County of San Francisco, entitled "In the Matter of the Estate of Robert Russell Sidebotham, Alias, Deceased," and numbered 123669 therein, and for the same cause of action as that set forth in the third amended complaint herein, a decree was duly given and made establishing that Helen Marceau Sidebotham, the plaintiff herein, had no right, title or interest of any kind whatsoever in the cause of action described in said proceeding, which is the same cause of action described in the above-entitled action, and that Robert Sidebotham and James Sidebotham, two of the defendants in this action, were the sole heirs at law of Robert Russell Sidebotham, alias, deceased, who died intestate, and the only persons entitled to distribution of the estate of said Robert Russell Sidebotham, alias, deceased.

Wherefore, said defendants pray that plaintiff take nothing by this action, and that they be hence dismissed with their costs.

Dated: October 22, 1955.

/s/ DELGER TROWBRIDGE,

/s/ FRANK FONTES,

Attorneys for Defendant W. A. Robison, as Said
Administrator;

/s/ 'THEODORE M. MONELL,
Attorney for Defendants Robert Sidebotham and
James Sidebotham.

Duly verified.

[Endorsed]: Filed October 27, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, Chief Judge :

This case was removed to the federal court because of diversity of citizenship (28 U.S.C., Sec. 1441).

The background of this case in its pleading stage, and the major allegations of plaintiff's complaint are to be found in the opinion of the Court of Appeals reported in 216 F. 2d 816. The lower court granted motions to dismiss the complaint on file herein on November 5, 1953, without leave to amend. This order was appealed, and the Court of Appeals ruled that "the appellant, in her third amended complaint, has pleaded facts showing a violation of her rights to property claimed and held by appellees."

On the trial of this case the plaintiff proved by credible evidence that she was the victim of a fraud on the part of her husband, Robert Sidebotham, in that he kept her in ignorance of the true extent of

their community property. Further, that she did not until after the death of Robert Sidebotham on December 21, 1951, discover facts constituting fraud against her, from which she here seeks relief. In other words, plaintiff sustained the burden of proving the allegations of her complaint, i.e., fraud; her reliance on the fraudulent representations of decedent; and her lack of knowledge of the true extent of the community property of the marriage up until the latter part of 1951.

The defendants raised several defenses to plaintiff's claim:

(1) That the parties were validly divorced in the year 1940 by virtue of a Wyoming decree secured by decedent;

(2) That the statement, "there is no community property," in the plaintiff's Reno divorce complaint should preclude her recovery herein;

(3) That plaintiff did not sustain her burden of proving that the property on hand at the time of death was community property rather than decedent's separate property;

(4) That the decree in the proceeding commenced by plaintiff under Section 1080 of the Probate Code is *res judicata* in this case; and

(5) That plaintiff has allowed the statute of limitations to run against her, has been guilty of laches or by her conduct has estopped herself from relying on the Nevada divorce decree.

(1) Validity of Wyoming Divorce

The defendants contend that the Wyoming divorce decree secured by the decedent in 1940 was valid. The plaintiff contends that said decree was void because of false statements in the affidavit made by decedent to obtain the order of publication of summons. Said Wyoming decree, which, in any event, did not purport to dispose of any property rights between the spouses is subject to collateral attack. The plaintiff herein, a California resident, did not participate in the Wyoming proceedings nor did she make a personal appearance therein.

The parties after their marriage in 1928 lived in the State of California, and lived in other states, as husband and wife. The facts showed that the decedent was living separate and apart from his wife, without her fault, at the time he secured the Wyoming decree by means of substituted service. There was no evidence whatsoever, other than the recital in the Wyoming decree, that the decedent ever resided there, nor did that fact change the matrimonial domicile of the parties from California.

The evidence is uncontradicted that in 1940, when the decedent procured his divorce in Wyoming, he stated upon his oath, that the residence of the plaintiff was "unknown and cannot, with reasonable diligence be ascertained." He thereby committed a fraud upon the Wyoming Court, and upon the plaintiff, his wife. Plaintiff testified that decedent visited her, cohabitated with her, and paid

her rent in the year 1940. This testimony was corroborated by Mr. Scardino, whose parents owned the hotel where plaintiff resided at that time. This evidence establishes the fact that decedent did know where his wife was residing at the time he swore he did not. The divorce decree rendered by the Wyoming Court is not entitled to full faith and credit, *Delanoy vs. Delanoy*, 216 Cal. 27, and the fraud committed by decedent renders the decree invalid.

(2) The Reno Divorce Decree

Defendants contend that plaintiff is in error in maintaining that the Nevada divorce decree secured by her in 1946 is helpful to her case. Defendant states that there is nothing in the opinion of the Court of Appeals to overthrow the usual rule concerning admissions against interest, and that the statement "there is no community property," appearing in plaintiff's divorce complaint was an admission against interest by plaintiff. In view of all of the evidence it cannot be said that this statement contained in plaintiff's divorce complaint should preclude recovery in this case. Plaintiff's position, which is the basis of her suit, is that for all the years that she was married to decedent, and up until 1951, she was completely uninformed as to any community property which may have been in existence. Her allegation in her divorce complaint was based on this limited knowledge, and her reliance on decedent's statements that he did not have any prop-

erty. Plaintiff's statement made as it was in reliance on decedent's fraudulent representations, should not bar her recovery.

(3) Tracing of Assets

Defendants contend that plaintiff has no case unless she can prove by the preponderance of the evidence that the property on hand in 1951 was on hand when the Wyoming decree was obtained in 1940, or its changes are definitely identified. In view of the invalidity of the Wyoming decree, the date of the Reno decree in 1946 is the date from which the accounting should be made.

The evidence reveals that the decedent opened his safety deposit box in San Francisco, January 9, 1943, which was almost four years prior to the divorce procured by plaintiff. He kept in this safety deposit box, or succeeding numbers of the same, at the time of his death, \$64,770.00 in cash, \$2,500.00 Postal Savings Certificates, 20 25-cent War Savings Stamps, and various other documents, right next to the money and currency, which bore dates commencing April 23, 1928; July 21, 1931; July 5, 1935, as well as other dates, prior to the year 1946.

The attorney for defendants read into evidence the actual and specific denominations of cash bills of currency found in the safety deposit box, but did not read a single serial number which would indicate the year and vintage of the bills.

The evidence shows that decedent opened his Pacific National Bank account in San Francisco on

November 21, 1946; the Anglo California National bank account on December 4, 1941, and another one at the same bank on August 31, 1946. The decedent opened his Bank of America account on June 5, 1943, and his account with Merrill, Lynch, Pierce, Fenner and Beane on February 8, 1946.

Counsel for the parties herein stipulated, in substance, to the following:

“That between the years 1935 and 1946, Mr. Sidebotham, the decedent, was busy in negotiating deals pertaining to real estate transactions and oil royalties, in which he had an interest, and which numbered approximately seventy in number.”

The evidence also shows that the administrator of decedent's estate filed a letter mailed by the U. S. Treasury Department, which determined the decedent's tax liability, insofar as the records of that office were concerned. Said Treasury letter indicated that decedent did not file a tax return for the years 1946 through 1950, but that he did file a return for 1951, in the sum of \$10,015.06. The administrator corroborated the facts stated in said letter. There is a presumption, of course, that decedent complied with the law, i.e., he did not commit a crime or fraud in failing to file returns in the years 1946 through 1950. Then the conclusion must follow that decedent was living from capital acquired prior to his divorce in 1946, during those years when he did not file such returns. Therefore, all but \$10,015.06 of his estate must have been accumulated prior to the year 1946.

With this evidence in the record the court concludes that all of decedent's property, other than \$10,015.06 was community property, to which plaintiff has a legal right if she prevails herein.

(4) The Effect of the Decree Under Section 1080 of the Probate Code

The defendants contend, in effect, that plaintiff's claim has already been adjudicated because she filed a petition for determination of heirship in the Probate Court, and allowed a default to be taken against her.

The record indicates that plaintiff was not sure of the state court's jurisdiction, and that she filed two matters at about the same time. One of the matters was in the Probate Court, and the other was the action now before this court.

The plaintiff contends that after she filed in the Probate Court, she withdrew because of the fact that she was not in privity with the estate, and accordingly said court was without jurisdiction of the subject matter of her claim. In the instant case the plaintiff was not decedent's widow, and at the time of his death was a stranger to the estate. The law of California states that the Probate Court has no jurisdiction to determine adverse claims to the properties of an estate in course of administration before it when asserted by a stranger to said estate. *Estate of King* (1926), 199 Cal. 113. The court's holding in the case of *Schylen vs. Schylen*, 43 Cal. 2d 361, has not changed this general rule. That

case decided that matters which the State Superior Court acting in the exercise of its probate jurisdiction may try, can nevertheless be tried in the Superior Court by virtue of its general jurisdiction, by waiver of the parties, but that matters which must be tried in the Superior Court in its general jurisdiction, such as claims of title between the estate and strangers cannot be tried in the Probate Court since the Probate Court is without jurisdiction.

Quoting from page 373 of said opinion:

“It is certainly true that the court in a probate proceeding is concerned with the settlement of the estate and not with controversies between the estate and strangers, the adjudication of which is the function of the court in the exercise of its general jurisdiction.”

The Probate Court did not have jurisdiction to hear plaintiff's claim and therefore she is not precluded from proceeding herein.

(5) Statute of Limitations: Laches, Estoppel

Defendants cite the case of *Champion vs. Wood*, 79 Cal. 17, which case precluded the wife's recovery because of laches, as similar to the facts of the instant case, and therefore determinative against plaintiff. The question before the appeals court in *Champion vs. Wood*, *supra*, was whether the complaint stated facts sufficient to constitute a cause of action. The court stated:

“It is not claimed in the complaint that any misrepresentations were made as to the amount of property which had been acquired during the marriage. They were misrepresentations as to the rights of the parties with respect to the property misrepresentations of law.”

This quotation clearly distinguishes the *Champion* case, as plaintiff in the instant case was wholly unaware that property was being accumulated during the marriage, and decedent had property secreted under many aliases. None of this property was ever brought to the attention of the wife until after the death of decedent.

All of the arguments submitted by counsel for the defendants as to plaintiff's failure to investigate decedent's financial position, when placed in proper perspective, actually constitute arguments in favor of plaintiff. This is so because they forcefully underline the fact of plaintiff's reliance on decedent's misrepresentations.

The plaintiff was not put on inquiry by anything she knew of deceased's wealth, since the evidence revealed there were no indications that he had any, so successful had his concealment been. The husband's deception, which continued up to the time of his death, was concealment of the plaintiff's right of action, against which the Courts of California grant relief, dating from discovery even in cases not involving fiduciary relations. The evidence when considered in its entirety does not show the elements or the presence of estoppel or laches,

and does not support the defense of statute of limitations.

In accord with the foregoing, it is Ordered that the defendants account for all monies, assets, and properties, held for and to the account of the Estate of Robert Sidebotham, deceased;

That the sum of \$10,015.06 be subtracted from the sum total of said assets, monies and properties; and

It Is Decreed that plaintiff is the owner and entitled to the possession of an undivided one-half of the balance of said assets, monies and properties, constituting the Estate of Robert Sidebotham, deceased. The plaintiff shall prepare findings of fact and conclusions of law in accordance with the rule, and the respective parties shall pay their own costs.

Date: Jan. 24, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District
Court.

[Endorsed]: Filed January 24, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having been heard by the Court without a jury and evidence, both oral and documentary having been presented and the

matter duly submitted, the Court now makes the following findings:

Findings of Fact

1. That Robert Sidebotham died intestate on December 21, 1951. At the time of his death he was in possession and control of the property specified in Inventory and Appraisal filed in probate proceedings, case No. 123669, California Superior Court, City and County of San Francisco, in re: Estate of Robert Sidebotham, deceased, inclusive of the following, to wit: Contents of Safety Deposit Box, at the American Trust Company, in San Francisco, containing the sum of \$64,770.00; postal certificate No. 9095, \$2,500.00; twenty 25-cent War Savings Stamps, \$5.00; stock sold prior to death, \$400.00; Bank of America (Day & Night), \$1,867.00; Bank of America (6th and Olive), \$1,120.79; Bank of America (Arguello and Geary), \$2,524.75; Merrill, Lynch, Pierce, Fenner & Beane, brokerage account, \$792.10; Pacific National Bank, \$525.79; U. S. Postal Savings, \$560.12; Anglo-California National Bank, \$433.24; Eureka Federal Savings and Loan Association, \$4,217.56; 1949 Lincoln Sedan, Engine No. 13 A7094, \$1,420.00; Real Estate in the City and County of San Francisco, described: Beginning at a point on the N. line of Geary Blvd., distant thereon 100 feet westerly from the westerly line of 14th Avenue; running thence westerly along the northerly line of Geary Blvd. 27 feet, 6 inches, thence at a right angle easterly 27 feet, 6 inches;

and thence at a right angle southerly 100 feet to the point of the beginning, being a portion of block 1446, lot number 25. improved, \$30,000.00; six shares of the capital stock of El Vado Corporation, Nevada corporation, Certificate No. 19, dated July 5, 1935. Two Thousand shares of the capital stock of Inter-Provincial Oils, Ltd., Dominion of Canada, Certificate No. 5766, dated July 21, 1931. Five Hundred shares of the capital stock of Crescent City Properties Company, Nevada corporation, Certificate No. 14, dated April 23, 1928, 250 shares, and Number 15, dated April 23, 1928, 250 shares. That said property was held, kept and controlled by him, under various and sundry names and aliases.

2. That said property, upon the death of Robert Sidebotham, passed from the control, possession and management of said decedent, to Phil C. Katz, as his personal representative, and to the present successor of said representative, to wit: W. L. Robison, the duly qualified and acting administrator of the Estate of Robert Sidebotham, Deceased, being one of the defendants in the action.

3. That the plaintiff, Helen Marceau Sidebotham, and said decedent, Robert Sidebotham, were married in the City of Tijuana, Lower California, Mexico, on May 30, 1928, and remained husband and wife until she divorced Robert Sidebotham on November 14, 1946, in the State of Nevada, by substituted service. That although said judgment of divorce found the allegations of the complaint to be true, one of which allegations was

that there was no community property, plaintiff was not aware that the same was in her complaint, she was not questioned at the trial about any community property, and the decree made no adjudication of property rights. That the plaintiff first discovered that her complaint in the Nevada action made reference to the fact that there was no community property on or about July 13, 1953. That the property involved in the case at bar was located outside of the State of Nevada, and the jurisdiction of that State Court.

4. That the decedent at all times concealed from the plaintiff the fact that he had accumulated property during the marriage, which belonged to the community. She was at all times ignorant concerning the extent thereof, nor was she put on inquiry concerning any circumstances known to her, nor did she until after the death of Robert Sidebotham, on December 12, 1951, discover facts constituting the existence of said property and of the said fraud against her.

5. That said property, excepting the sum of \$10,-015.06, was acquired prior to November 14, 1946, by the decedent, and all of his estate was acquired or accumulated during the marriage relationship of the parties, inclusive of the period of time between the years 1935 and 1946, during which time the decedent was busy in negotiating deals pertaining to real estate transactions and oil royalties, in which he had an interest, and which numbered approximately seventy in number. That on November 14,

1946, by virtue of the divorce between the parties, plaintiff and said decedent became, and ever since have been, tenants in common of said property, save and except said sum of \$10,105.06 thereof.

6. That the decedent procured a judgment of divorce against plaintiff in the State of Wyoming on October 2, 1940. That said judgment was upon substituted service. That when the decedent procured said divorce in Wyoming, he stated upon his oath, that the residence of the plaintiff was "unknown and cannot, with reasonable diligence be ascertained." That said decedent did in fact know where the plaintiff resided, prior thereto in the year 1940, in the City of San Francisco, where he visited her, cohabited with her, and paid her rent in said year 1940. That said judgment did not purport to dispose of any property rights. That it is subject to collateral attack, in that it was obtained by false statements in the affidavit made by decedent to obtain the order of publication of summons. That said decree was void. That in 1940 the matrimonial domicile of the parties was the State of California. That plaintiff was a resident of California, did not participate in the Wyoming proceedings, nor did she make a personal appearance therein.

7. That at the time of decedent's death, the plaintiff was not decedent's widow, but she was a stranger to the estate. That she filed a claim to the property rights asserted herein under Section 1880 of the Probate Code of the State of California in

the Estate Probate proceedings in the Superior Court of the State of California, in San Francisco, but did not pursue the claim further and allowed a default to be taken against her. She did so because of the fact that she was not in privity with the estate, and on the basis that the said probate court had no jurisdiction of the subject matter of her claim. It is found that the probate court aforesaid had no jurisdiction.

8. The defendants, Robert Sidebotham and James Sidebotham, are sons of decedent, by a prior marriage, and are entitled to take as heirs at law, and as their rights may be determined under the laws of succession of the State of California, as to the property left by decedent, not otherwise disposed of in favor of the plaintiff by this judgment.

Conclusions of Law

1. That all of the monies, assets, and properties possessed and controlled by the decedent at the time of his death on December 21, 1951, and held for and on account of the Estate of Robert Sidebotham, deceased, excepting the sum of \$10,015.06 thereof, were acquired and accumulated by said decedent, prior to November 14, 1946.

2. That plaintiff has at all times since November 14, 1946, been the owner and entitled to the possession of an undivided one-half thereof as tenant in common.

3. Defendants are ordered to account to the plaintiff for all such monies, assets and properties

held for and to the account of the Estate of Robert Sidebotham, Deceased.

Let Judgment Be Entered Accordingly in Favor of the Plaintiff and Against Defendants, and Each of Them; Each of the Parties to Bear His or Its Own Costs Incurred Herein.

Dated: January 27th, 1956.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Affidavit of Service by Mail attached.

Lodged January 30, 1956.

[Endorsed]: Filed February 27, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 32531

HELEN MARCEAU SIDEBOTHAM,

Plaintiff,

vs.

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, et al.,

Defendants.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury, and the Court having

heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith:

It Is Hereby Ordered, Adjudged and Decreed, that the plaintiff have and recover judgment against the defendants, W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased; and James Sidebotham and Robert Sidebotham.

The defendant, W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased; and James Sidebotham and Robert Sidebotham, are hereby ordered to account to plaintiff Helen Marceau Sidebotham, for all monies, assets, and properties, which have been held for and to the account of the Estate of Robert Sidebotham, deceased.

It is further ordered that defendant W. A. Robison, as Administrator of the Estate of Robert Sidebotham, deceased, pay out of the funds of said estate, in due course of administration, to plaintiff Helen Marceau Sidebotham, an undivided one-half of all the monies, assets, and properties, possessed and controlled by the decedent, at the time of his death on December 21, 1951, after first deducting therefrom, the sum of Ten Thousand Fifteen Dollars and Six (\$10,015.06) Cents.

Each of the parties shall bear his or its own costs.

Dated January 27, 1956.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Lodged January 30, 1956.

[Endorsed]: Filed and entered Feb. 27, 1956.

[Title of District Court and Cause.]

PETITION OF PUBLIC ADMINISTRATOR
AND OF HIS ATTORNEYS FOR ALLOW-
ANCE OF EXPENSES OF DEFENSE, IN-
CLUDING ATTORNEYS' FEES

Come now, W. A. Robison, as administrator of the estate of Robert Sidebotham, deceased; Frank J. Fontes and Delger Trowbridge, and petition the above-entitled Court for an allowance for the expenses of defending the above-entitled action, including attorneys' fees to Frank J. Fontes and Delger Trowbridge, and on this behalf allege as follows, to wit:

I.

That petitioner, W. A. Robison, as administrator, and his predecessor in interest, Phil C. Katz, as Public Administrator of the City and County of San Francisco, State of California, were duly appointed administrators of the estate of Robert Sidebotham, deceased, at all times after February 13, 1952, and said W. A. Robison is now acting as said

administrator. Frank J. Fontes at all times herein mentioned has been the regular attorney for Phil C. Katz and W. A. Robison, as said administrators, and Delger Trowbridge was appointed special counsel for Phil C. Katz and W. A. Robison as said administrators by an order of the Probate Department of the Superior Court of the State of California, in and for the City and County of San Francisco, some time in the month of February, 1952.

II.

That on the 10th day of October, 1952, the above-named plaintiff filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against Phil C. Katz, as administrator of the estate of Robert Sidebotham, deceased, et al., to quiet title to certain property described in said complaint, for an accounting and for an injunction, and she immediately thereafter filed a first amendment to said complaint. That said last mentioned papers were served on Phil C. Katz, as said administrator, shortly thereafter. That thereafter and during the month of February, 1953, said action was removed to the above-entitled court on the ground of diversity of citizenship, defendants Robert Sidebotham and James Sidebotham, the heirs at law, being residents of states other than the State of California.

III.

That thereafter petitioners Frank J. Fontes and Delger Trowbridge performed the following serv-

ices in defending said action. That said attorneys examined the following pleadings filed by the plaintiff as hereinafter set forth. Thereafter plaintiff filed her first amended complaint in said action and thereafter she filed her second amended complaint. Thereafter and on or about July 1, said attorneys served and filed their notice of motion to dismiss plaintiff's second amended complaint, which document, together with the memorandum of authorities attached thereto, was five pages long. That thereafter plaintiff filed her third amended complaint herein. Thereafter said attorneys filed a notice of motion to dismiss, which was granted, without leave to amend, by the Honorable Oliver J. Carter, a Judge of the above-entitled court. Thereafter plaintiff took an appeal from the said order dismissing her third amended complaint without leave to amend to the United States Court of Appeals for the Ninth Circuit. Said attorneys made a motion to dismiss said appeal on the ground of lack of diligence of plaintiff in prosecuting her appeal, which said motion was denied. Said attorneys then examined the record on appeal as proposed by plaintiff's attorney and were successful in having a more accurate and full record on appeal prepared. After plaintiff's attorney prepared and filed her opening brief, these petitioning attorneys prepared their brief on appeal and subsequently argued the matter before said United States Court of Appeals. After said United States Court of Appeals reversed said order of the Honorable Oliver J. Carter, these petitioning attorneys filed their petition for re-

hearing. Thereafter, and on or about March 17, 1955, these petitioning attorneys filed an answer on behalf of W. A. Robison, as said administrator, which answer was six pages long. Thereafter plaintiff filed an amendment to her third amended complaint and these petitioning attorneys filed an answer on behalf of said Public Administrator to the third amended complaint, as amended, which was six pages long. Thereafter these petitioning attorneys made a motion to inspect certain documents and also propounded certain written interrogatories to the plaintiff. Thereafter and on or about February 18, 1955, these petitioning attorneys attended the taking of the deposition of plaintiff in the City of Los Angeles, State of California, for which purpose petitioner Delger Trowbridge made a special trip from San Francisco, California, to Los Angeles County and a full day and night were expended by him in traveling to Los Angeles for the purpose of taking said deposition. That thereafter these petitioning attorneys made a motion to have the above-entitled cause set for trial. Thereafter this cause came on for trial and was tried before the above-entitled court on October 24, October 25, October 26 and October 27, 1955. On October 27, 1955, petitioner Delger Trowbridge argued said case before the honorable court and thereafter filed a written brief on behalf of said Public Administrator, which brief was 22 pages long. Thereafter plaintiff served on said Public Administrator proposed findings of fact and conclusions of law in the

above-entitled matter, and thereafter these petitioning attorneys proposed amendments thereto. Thereafter these petitioning attorneys prepared in open court on February 27, 1956, and presented their arguments in support of said proposed amendments to said findings of fact and conclusions of law.

IV.

W. A. Robison, as said administrator, and Phil C. Katz, his predecessor in interest as said administrator, have expended the following moneys in defending said action:

Expenses of printing brief on appeal.....	\$115.14
Expense of printing petition for rehearing after decision on appeal	76.52
Expenses of taking deposition of plaintiff in Los Angeles, California, as follows:	
Reporter's fee	98.64
Traveling expenses of Delger Trowbridge	49.15
Reporter's fee for transcribing partially the proceedings at the trial of said action....	92.40

V.

The above-entitled action was defended by said Public Administrator through his counsel above-named in good faith and on reasonable grounds. The defense of said action was necessary for the proper protection and preservation of the properties and assets of Robert Sidebotham, deceased, in the possession of Phil C. Katz and W. A. Robison as administrators of said estate, and petitioners allege that said attorneys Frank J. Fontes and Del-

ger Trowbridge are entitled to a reasonable fee for their services incurred as aforesaid in the defense of said action. Petitioner W. A. Robison as said administrator alleges that the moneys expended as aforesaid by said Phil C. Katz and W. A. Robison were reasonably necessary for the proper defense of said action. This petition is made without prejudice to the right of these petitioners to make any further petition to the Probate Department of said Superior Court of the State of California, in and for the City and County of San Francisco for fees and expenses pertaining to this action.

/s/ FRANK J. FONTES,

/s/ DELGER TROWBRIDGE,

Attorneys for W. A. Robison, as Administrator of the Estate of Robert Sidebotham, Deceased, and Also as Copetitioners.

Duly verified.

[Endorsed]: Filed February 27, 1956.

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR ALLOW-
ANCE OF EXPENSES INCLUDING AT-
TORNEYS' FEES

The petition of W. A. Robison, Administrator of the Estate of Robert Sidebotham, deceased, and Frank J. Fontes and Delger Trowbridge, his attorneys, for an order allowing them the expenses of defending the above-entitled action, including attorneys' fees, having been presented and argued

this day, It Is Hereby Ordered that said petition be and it is hereby denied without prejudice.

Done in Open Court this 27th day of February, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge of the United
States District Court.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that W. A. Robison, administrator of the estate of Robert Sidebotham, deceased, and Robert Sidebotham and James Sidebotham, and each of them hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment in favor of the plaintiff, signed and filed by the Honorable Michael J. Roche on February 27, 1956, and entered on the same day.

Dated: March 23, 1956.

/s/ FRANK J. FONTES,

/s/ DELGER TROWBRIDGE,

Attorneys for Defendant, W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased.

/s/ THEO. M. MONELL,

Attorney for Defendants, Robert Sidebotham and James Sidebotham.

[Endorsed]: Filed March 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant, W. A. Robison, administrator of the estate of Robert Sidebotham, deceased, and Frank J. Fontes and Delger Trowbridge, his attorneys, and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order denying the petition of W. A. Robison, administrator of the estate of Robert Sidebotham, deceased, for the allowance of expenses of defense including attorneys' fees incurred by him in the above-entitled court on behalf of the estate of Robert Sidebotham, deceased, signed and filed by the Honorable Michael J. Roche on March 27, 1956, and entered on the same day.

Dated: March 27, 1956.

/s/ FRANK J. FONTES,

/s/ DELGER TROWBRIDGE,

Attorneys for Defendant, W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, that W. A. Robison, Administrator of the Estate of Robert

Sidebotham, Deceased, as Principal, and \$250.00 cash tendered by him into the Registry of the Court this date, is held and firmly bound unto Helen Marceau Sidebotham, the plaintiff in the above-entitled action, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said plaintiff; to which payment, well and truly to be made, I bind myself by these presents.

Dated this 27th day of March, 1956.

Whereas, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said Court between Helene Marceau Sidebotham, plaintiff, and W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, James Sidebotham and Robert Sidebotham, a judgment was rendered against the said defendants on February 27, 1956, and the said defendants having filed a notice of appeal from said judgment in said Court, now said bond is conditioned to secure the payment of plaintiff's costs on appeal if the appeal is dismissed or the judgment affirmed or of such costs as the United States Court of Appeals may award if the judgment is modified.

/s/ W. A. ROBISON,
Administrator of the Estate of Robert Sidebotham,
Deceased.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, that W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, as Principal, and \$250.00 cash tendered by him into the Registry of the Court this date, is held and firmly bound unto Helen Marceau Sidebotham, the plaintiff in the above-entitled action, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said plaintiff; to which payment, well and truly to be made, I bind myself by these presents.

Dated this 27th day of March, 1956.

Whereas, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said Court between Helen Marceau Sidebotham, plaintiff, and W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, James Sidebotham and Robert Sidebotham, an order was made denying petition of said W. A. Robison as said Administrator and Frank J. Fontes and Delger Trowbridge, his attorneys, applying for the allowance of the expenses of defending the above-entitled action, including attorneys' fees, by an order made and filed herein on March 27, 1956, now said bond is conditioned to secure the payment of plaintiff's costs on appeal if the appeal is dismissed or the order affirmed or of such costs as the United States

Court of Appeals may award if the order is modified.

/s/ W. A. ROBISON,
Administrator of the Estate of Robert Sidebotham,
Deceased.

[Endorsed]: Filed March 27, 1956.

In the United States District Court for the North-
ern District of California, Southern Division
No. 32531

Before: Hon. Michael J. Roche, Judge.

HELENE MARCEAU SIDEBOTHAM,

Plaintiff,

vs.

W. A. ROBISON, Administrator of the Estate of
Robert Sidebotham, et al.,

Defendants.

REPORTER'S TRANSCRIPT

Monday, October 24, 1955

Appearances:

For the Plaintiff:

MANUEL RUIZ, JR., ESQ.

For the Defendant Robison:

DELGER TROWBRIDGE, ESQ.

For Defendants Sidebotham:

THEODORE M. MONELL, ESQ.

Mr. Monell: We offer in evidence first, and in accordance with our agreement, I will read the statement of claim and then we will supply certified copies. Is that satisfactory to you, Mr. Ruiz?

Mr. Ruiz: Yes.

Mr. Monell: This is headed: "In the Matter of the Estate of Robert Russell Sidebotham, Deceased, No. 123669, in the Superior Court of the State of California in and for the City and County of San Francisco." The document is entitled: "State of Claim of Interest in Estate Pursuant to Probate Code 1080.

"Helene Marceau Sidebotham, respectfully presents this her written statement setting forth her interest in the estate of Robert Russell Sidebotham, deceased, and alleges as follows:

I.

"That Robert Russell Sidebotham died intestate during the month of December, 1951.

II.

"That Phil C. Katz, has been appointed by the above Court as administrator of the Estate of said deceased, and he is now the duly qualified and acting administrator of said estate. [14*]

III.

"That notice to creditors in the manner required by law has been given and the time to file and present claims against the estate has expired, but the estate is not in a condition to be closed.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

IV.

“That the only heirs of said decedent, other than petitioner, as hereinafter set forth are, two sons, to wit: Robert Sidebotham and James Sidebotham, by a former marriage of decedent.

V.

“That said estate consists of community property only, as well as increase thereof, all of which constitutes property of petitioner, by virtue of the following facts:

“a. That plaintiff and decedent were married in the City of Tijuana, Lower California, Mexico, on May 30, 1928. That petitioner and decedent were at all times husband and wife, commencing on May 30, 1928, up to and including the 14th day of November, 1946. That on the 14th day of November, 1946, said marriage was dissolved by a Court of competent jurisdiction.

“b. That the matrimonial domicile of the [15] petitioner and decedent was at all times the State of California.

“c. That during the marriage decedent accumulated and acquired real and personal property, consisting in excess of \$75,000.00 cash, on deposit in banks within the State of California, including real estate and other properties, nature and extent of which property is unknown to petitioner, and as soon as the same is ascertained, petitioner will ask leave of Court to insert the same herein, by way of amendment.

VI.

“That said community property, has never been partitioned, either by agreement of petitioner and decedent, judicial decision, or otherwise; and upon the death of decedent, petitioner became entitled to receive one-half thereof by survivorship, and retain the other half thereof, which she at all times has owned from the moment of its acquisition during the marriage.

“Wherefore, petitioner prays that the Court determine that she is entitled to said property of said estate above set forth and that a judgment and decree of the Court be made accordingly.

“/s/ MANUEL RUIZ,

“Attorney for Petitioner.”

Verified.

“State of California,

“County of Los Angeles—ss.

“Helene Marceau Sidebotham being by me first duly sworn, deposes and says: that she is the Petitioner in the above-entitled action; that she has read the foregoing State of Claim of Interest in Estate Pursuant to Probate Code 1080 and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

“/s/ HELENE MARCEAU
SIDEBOTHAM.

“Subscribed and sworn to before me this 3rd day of December, 1952.

“MANUEL RUIZ,

“Notary Public in and for Said County and State of California.”

With the notarial seal, bearing his signature and bears a filing mark “Filed December 4, 1952, Martin Mongan, Clerk; D. F. Breen, Deputy Clerk,” and bears a note that it was set for hearing on March 9, 1953, reset April 13, 1953, and reset with a blank date.

We further then wish to introduce and read into evidence the Decree Establishing Heirship, which bears the filing mark [17] “Filed December 14, 1953, Martin Mongan, Clerk, by P. L. Clavere, Deputy Clerk.”

This is also entitled in the same court.

“In the Matter of the Estate of Robert Russell Sidebotham, Alias, Deceased, No. 123669, Department No. 9.

“Decree Establishing Heirship

“The petition of Robert E. Sidebotham and James J. Sidebotham praying that the court determine who are entitled to distribution of the estate of Robert Russell Sidebotham, alias, deceased, came on regularly for hearing this day. Proof is made to the satisfaction of this court, and the court finds that notice of the time and place of the hearing of said petition has been regularly given in accordance with

the provisions of Section 1200 of the Probate Code, and also to all persons requesting special notice of the matters specified in Section 1202 of the Probate Code.

“It appears that Robert E. Sidebotham and James J. Sidebotham have appeared herein by their attorney within the time allowed, and have filed herein their written statement setting forth their respective claims of interest in said estate, and that Helene Marceau Sidebotham also appeared by her petition filed herein on the 4th day of December, 1952,

“Wherefore, the court proceeds to hear the petitions of both Robert E. Sidebotham and James J. Sidebotham, and of Helene Marceau Sidebotham, and after hearing the evidence and [18] arguments of counsel, the court determines as follows, to wit:

“It Is Ordered, Adjudged and Decreed by the court that Robert Russell Sidebotham, alias, died intestate on the 21st day of December, 1951, leaving surviving as his only heirs at law and the only persons entitled to distribution of said estate Robert E. Sidebotham and James J. Sidebotham, the sons of said decedent; that thereupon the estate of said decedent descended to his said heirs at law and is now vested in them, subject to administration, share and share alike, and each of said persons is entitled to distribution of one-half of said estate when said estate shall be in a condition to be closed.

“It Is Further Ordered, Adjudged and Decreed that the petition of Helene Marceau Sidebotham be and the same is hereby denied.

“Done in Open Court this 10th day of December, 1953.

“/s/ T. I. FITZPATRICK,
“Judge of the Superior
Court.”

The record shows that no appeal has been taken from the order made and that the order has by lapse of time become final.

For the purpose of the record, I would like to offer the petition and the decree establishing heirship mentioned as exhibits in this matter and to be numbered when the certified copies are produced. And they may be considered as exhibits on behalf of all the defendants and bear the number 1 or A, whatever procedure the court follows. [19]

Mr. Clerk, do defendants' exhibits bear numbers or letters?

The Clerk: They will bear letters.

The Court: Pardon me. I would like to hear from counsel.

Mr. Ruiz: We would assume from the reading of the petition and the judgment of the Court that there was a hearing had on this matter, but counsel for plaintiff was not only not present by Mrs. Sidebotham was not present, and the recital to the effect that evidence was taken and so forth and so on did not occur insofar as Mrs. Sidebotham was concerned.

She filed a petition under a specific Probate Code Section, 1080, where she asserted that she was an heir, under that particular and specific probate sec-

tion of the law. As the Court knows, the Probate Court is not a court of general jurisdiction and by its jurisdiction was limited and has always been limited to a determination of who are the heirs at law and nothing else.

As soon as the plaintiff in this action ascertained that she was in the wrong court, she instituted an independent action in the Superior Court, which was one of general jurisdiction, where her claims, not as an heir, but her claims as a tenant in common of certain property which was community property at the time that she was married to him and later became a tenant in common upon the dissolution of the divorce could be properly heard. [20]

Counsel representing the estate then made a motion to remove that matter from the state court to the District Court and we have been working on that up until today.

By virtue of the fact that the petition was improperly filed, nothing else was done with respect to that matter in the Probate Department. It indicates that counsel appeared and had a nice little default, and now they want to claim that that is a bar of her claims in this action.

With respect to the law, that the wife acquires, assuming that even she had been married to him—that she doesn't acquire a new right or interest generated in her by virtue of the death of her husband. Death merely affords the occasion of the termination of the husband's interest in the community property but doesn't do anything with re-

spect to her present vested interest which she always had. In other words, the wife's share belongs to her at the moment of its acquisition and not that she inherits anything from him.

If she had been married to him at the time he died and it was all community property, she would be entitled to received a hundred per cent of the estate. But she is not seeking a hundred per cent of the estate here. She is going back to 1946 and making certain allegations with respect to the fact that upon a dissolution of that marriage she then became tenants in common with him with respect to property that had been acquired theretofore and remained tenants in common with him with respect [21] to its additions thereafter, and therefore she has to sue not in the Probate Court but she has to sue in another action. And that is the situation here.

Where a final decree of divorce makes no disposition of community property, the view is that after the divorce the parties are tenants in common. And that is before this Court.

Mr. Monell: If the Court please, I should perhaps supplement, in view of counsel's statement, the document in evidence with an affidavit of mailing which was filed in the Probate Court in this same matter on December 10th, 1953. Shall I read the affidavit or would you prefer me to summarize it?

The Court: You may read it.

Mr. Monell: Thank you, your Honor. It is entitled:

“In the Matter of the Estate of Robert Russell Sidebotham, Alias, Deceased, No. 123669, Department No. 9.

“Affidavit of Mailing

“State of California,

“County of Marin—ss.

“June Tanforan, being sworn, deposes and says: That she is a citizen of the United States, over 18 years of age, a resident of Marin County, and not a party to the within-action. That affiant’s business address is 1539 Fourth Street, San Rafael, California; that affiant served a copy of the attached Notice of Hearing Petition to Determine Heirship by [22] placing a copy of said petition in an envelope addressed to Mr. O. A. Arthur, c/o Morris Lowenthal, 244 California Street, San Francisco, California; and a copy in an envelope addressed to H. J. Jepsen, 963 Mills Building, San Francisco, California; and a copy in an envelope addressed to Lloyd H. Burke, 422 Post Office Building, 7th and Mission Streets, San Francisco 1, California; and a copy in an envelope addressed to Manuel Ruiz, Jr., 704 So. Spring Street, Los Angeles 14, California; and a copy in an envelope addressed to W. A. Robinson, Public Administrator, Room 463, City Hall, 400 Van Ness Avenue, San Francisco, California, which envelopes were then sealed and postage fully prepaid thereon, and thereafter were on November 25, 1953, deposited in the United States mail at San Rafael, California.

“That there is delivery service by United States mail at the places so addressed, or regular communication by United States mail between the place of mailing and the places so addressed.

“/s/ JUNE TANFORAN.

“Subscribed and sworn to before me this 25th day of November, 1953.

“FRANK B. PEEBLES,

“Notary Public in and for
Said County and State.”

With the notarial seal attached.

The notice of hearing which is attached is dated—file marked March 27, 1953, Martin Mongan by D. F. Breen, Deputy Clerk. [23]

“In the Matter of the Estate of Robert Russell Sidebotham, Alias, Deceased. Notice of hearing.”

I was reading from the wrong notice of hearing, your Honor. It bears the file stamp “Filed November 27, 1953, Martin Mongan, Clerk, by D. F. Breen, Deputy Clerk.”

Entitled “In the Matter of the Estate of Robert Russell Sidebotham.”

“Notice of Hearing Petition to Determine Heirship

“Notice is hereby given that on the 9th day of March, 1953, Robert E. Sidebotham and James J. Sidebotham filed their petition in this court alleging that they are the heirs at law of Robert Russell Sidebotham, the above-named deceased, and pray-

ing that the rights of all persons interested in the estate of said Robert Russell Sidebotham, deceased, be ascertained and declared by this Court, and that it be determined to whom distribution thereof should be made.

“All persons who have or claim any interest in said estate are hereby notified that a hearing of said petition and of any objection thereto that may have been presented will be held before this Court in Department No. 9 thereof at the City Hall, 400 Van Ness Avenue, City and County of San Francisco, State of California, on the 10th day of December, 1953, at 10 o'clock a.m. of said day, at which time and place all persons interested may appear and show cause, if any they have, why such petition should not be granted and such order made. [24] Reference is hereby made to said petition for further particulars.

“Notice is further given that any person may appear and file with the clerk a written statement setting forth his interests in said estate.

“MARTIN MONGAN,

“Clerk.

“By D. F. BREEN,

“Deputy Clerk.”

Our contention, if the Court please, is that by virtue of that hearing there was a decision made by the Probate Court by which this particular petitioner is bound, and the law upholds our contentions in that respect.

The Court: Was she served?

Mr. Monell: She filed her own statement, if the Court please, of her interest, which I first read to your Honor, the one that was filed in February in which she said she claimed the entire estate "by virtue of the following facts"—and those are the same facts of which she alleges here.

Although the Probate Court is not a court of general jurisdiction as such, it is a court, as Mr. Justice Schenk has said in a recent decision of the Supreme Court, a court of general jurisdiction, but in estate and probate matters it may not decide certain extraneous matters, such as claims of outsiders to property within the estate. [25]

* * *

The Court: Do you wish to present this file or what do you wish to do?

Mr. Monell: We are going to submit copies of the documents which have been read in evidence so that the clerk may take these originals.

The Court: Very well.

Mr. Monell: Without disturbing the files.

The Court: Very well. Let them be admitted and marked.

The Clerk: The copy of the claim is Defendants' Exhibit A, and the copy of the decree is Defendants' Exhibit B, admitted in evidence.

Mr. Monell: Then the notice of hearing will be part of B and the affidavit of mailing will be part of B. We will submit those.

Mr. Ruiz: Just one clarification I would like to make.

Counsel stated this matter was heard in the Probate Court and that the plaintiff being dissatisfied with the ruling thereupon instituted an action before the same court in another department. That is not so, your Honor. The facts indicate that both of these actions were more or less—that is to say, the claim as an heir was put in, and this suit was instituted in the court of general jurisdiction, at approximately the same [27] time; that thereafter, by virtue of the jurisdictional limitation of the Probate Court, the plaintiff proceeded on this action and has continued until today.

The Court: So stipulated?

Mr. Monell: We will stipulate that the two actions were pending at approximately the same time, your Honor.

Mr. Ruiz: Very well.

Mr. Monell: We do maintain that the judgment of the Superior Court in the probate matter is binding upon the plaintiff in this matter.

The Court: Very well; let the record so show.

Mr. Monell: And it is binding, of course, in this court, and we are asking at this time for a judgment under Section 597 under our defense that the plaintiff was foreclosed from further proceeding.

The Court: Very well. Call your first witness.

Mr. Monell: For the purpose of the record, if the Court please, are you denying our motion?

The Court: No. You offered it in evidence, did you?

Mr. Monell: We make a motion at this time for judgment and that plaintiff be foreclosed from proceeding further by reason of the adverse ruling.

The Court: For the purpose of the record, the motion will be denied at this time. [28]

HELENE (MADELINE) MARCEAU
SIDEBOTHAM

the plaintiff herein, called as a witness in her own behalf; sworn.

The Clerk: State your full name, your occupation and your address to the Court.

A. Madeline Sidebotham, 6 Pollard, San Francisco.

Direct Examination

By Mr. Ruiz:

Q. You are the plaintiff in this action? You are the complaining party?

A. Yes, I am. Yes, I am.

Q. Did you know Robert Sidebotham during his lifetime? A. Yes, I did.

Q. And did you marry him?

A. Yes, I did.

Q. And when and where did you marry him?

A. Tijuana, Mexico.

Q. And when was that?

A. May 28th—no, May 30, 1928.

Mr. Ruiz: At this time I would like to offer into evidence a marriage certificate of the marriage record in Tijuana under the signature of the United Staes Consul by the Vice Consul of the United

(Testimony of Helene Marceau Sidebotham.)

States of America, William A. Carsey at Tijuana, Baja California, Mexico, as Plaintiff's first exhibit.

Mr. Trowbridge: It is in Spanish, your Honor. We don't [29] object to its going in evidence subject to examination.

The Court: Subject to any correction, let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 1 admitted in evidence.

(Marriage certificate referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Ruiz): Did you thereafter live with him as husband and wife?

A. Yes, I did.

Q. How long were you married to him?

A. Up until 1946, November.

Q. At that time did you procure a divorce from him?

A. Yes, I did.

Q. In what state? A. Nevada.

Q. At the time of said divorce, did you know whether there was any community property of the marriage?

A. I didn't know.

Q. Prior to the divorce, when was the last time you saw him?

A. 1941.

Q. And where was that?

A. It was in San Francisco.

Q. Do you recall the particular address?

A. Union Street. [30]

Q. Do you have a number? A. 380.

(Testimony of Helene Marceau Sidebotham.)

Q. Union Street here in San Francisco?

A. In San Francisco.

Q. Between that time and the year 1946 when you went to Nevada, did you see him?

A. Between 1941 and 1946?

Q. Yes. A. Yes, I did.

Q. You did? Between 1941 and 1946?

A. Oh, no, no, not in 1941, no.

Q. Pardon? A. No.

Q. You didn't see him between 1941 and 1946 before you went to Nevada; is that your testimony, or isn't it? A. Yes.

Q. Did you know during that period of time where he was? A. No, I didn't know.

Q. Now, the last time that you saw him, did you have a conversation with him?

A. Yes, I did.

Q. Where was that?

Mr. Monell: When?

Mr. Ruiz: I will get to when pretty soon, counsel.

Q. Where was it? [31]

A. It was at the Hansa Hotel.

Q. You saw him at the Hansa Hotel?

A. Yes.

Q. In 1946? A. Yes. Not in 1946.

Q. 1941? A. Yes.

Q. What part of 1941?

A. In summertime.

Q. Now, prior to the last time you saw him in the summer of 1941 did you ever discuss money

(Testimony of Helene Marceau Sidebotham.)

matters with him? A. Yes, we did.

Q. Did you ever discuss business with him?

A. No, no business.

Q. What money matters, if any, did you discuss?

A. Well, I asked him about the rent and the expenses and bills and things to live on.

Q. Did he pay rent for you?

A. Yes, he did.

Q. Did he take care of some of your expenses?

A. Part of them.

Q. Did he ever ask you for money?

A. Yes, he did.

Q. When was that?

A. Well, it was around 1938 he borrowed a hundred dollars [32] from me.

Q. Did you have a conversation about that time?

A. Yes, he said he was in trouble and he needed some money. He was in trouble with various people.

Q. Did he tell you what trouble he was in?

A. Not exactly. He said he was in trouble and he had to go to jail.

Mr. Monell: I will object upon the ground that it is incompetent, irrelevant and immaterial.

Mr. Trowbridge: We will join in that objection.

The Court: Was this a conversation?

The Witness: Yes.

Mr. Ruiz: Yes, about money.

The Witness: Yes; when he borrowed the hundred dollars from me, he explained to me what it was for and he told me he would give it back to me.

(Testimony of Helene Marceau Sidebotham.)

Mr. Monell: There is no materiality here.

The Court: You are entitled to the conversation, whatever it may be, in relation to the hundred dollars. Objection will be overruled.

The Witness: And he told me he would give it back to me as soon as he makes and gets some money.

Q. (By Mr. Ruiz): Did you ever ask for that money? A. Yes, I did.

Q. On more than one occasion? [33]

A. Yes, every time I saw him.

Q. And what would he say?

A. He said he was broke and he had a hard time.

Q. Did you believe him?

A. I believed him.

Q. After you were married, where did you first live?

A. We lived in Los Angeles on Bixel Street.

Q. Did you thereafter come up to San Francisco?

A. Well, we moved—we went different places. We lived different places before we came to San Francisco.

Q. Did you always live in the State of California? A. Yes, we did.

Q. When did you first come up to San Francisco?

A. In 1935. Oh, the first when we came from New York?

Q. No, after you were married and after you

(Testimony of Helene Marceau Sidebotham.)

lived in the southern part of the state, Los Angeles, when did you first come to live in San Francisco? A. 1935.

Q. And from the date of your marriage, 1928, to the year 1935, did you live in the southern part of the State of California? A. Yes, sir.

Q. Well, when you came up to San Francisco around 1935, were you and Mr. Sidebotham happily married? A. Yes, we were. [34]

Q. Where was he working at that time?

A. I believe in Santa Barbara at that time.

Q. I am going to show you a letter and ask you to identify the handwriting on this letter. Whose handwriting is that? A. That is his writing.

Q. By "his" you mean Mr. Sidebotham's?

A. Yes, Mr. Sidebotham's.

Q. When did you first see that letter recently?

A. I found it Saturday. I gave it to you Saturday.

Q. Where was it?

A. It was in a folder, a picture folder, with his picture on top.

Q. And do you recall him having sent you that letter? Do you recall him sending you that letter?

A. Yes, I remember; yes.

Q. And where was he working at that time?

A. I think he was in Santa Barbara at that time.

Q. And where were you living at that time?

A. Los Angeles.

(Testimony of Helene Marceau Sidebotham.)

Q. And that was just before you came to San Francisco? A. Yes.

The Court: He was working where, at that time?

The Witness: At Santa Barbara.

The Court: What kind of work, if you know?

The Witness: He was—I don't know exactly if he was selling property [35] or stocks; I can't recall what he was doing.

Q. (By Mr. Ruiz): By the way, during the time you were married to him, what was his occupation generally?

A. He did various things. He sell properties and selling all kinds of stocks and things like that.

Q. Stocks? A. More or less.

Q. Bonds?

A. Bonds, stocks, real estate.

Q. Did he promote oil deals?

A. Well, I believe he did, too, but he never told me **anything** about his business because he said I never understood.

Mr. Ruiz: At this time I would like to offer this in evidence and read it.

Mr. Monell: What is the date of it?

Mr. Ruiz: September 20th, Thursday.

Mr. Monell: What year?

Q. (By Mr. Ruiz): What year was this?

A. It must be about 1935.

Q. 1935?

A. Because that was before we came to San Francisco.

(Testimony of Helene Marceau Sidebotham.)

Mr. Ruiz: I will read the letter.

(Whereupon, Mr. Ruiz read the letter.)

The Court: Is this offered in evidence?

Mr. Ruiz: It is offered in evidence. [36]

The Court: It will be admitted and take the next number.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence.

(Whereupon, letter dated September 20th, Thursday, was received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. (By Mr. Ruiz): Mrs. Sidebotham, did you ever know your husband by the name of George W. Anderson? A. No, sir.

Q. Did you ever know your husband by the name of George William Brown? A. No, sir.

Q. Did you ever know that your husband used the name George W. Fenton? A. No, sir.

Q. Did you know him to use the name of Edward W. Hutton? A. No, sir.

Q. Or Edward Hutton? A. No, sir.

Q. Or E. W. Hutton? A. No, sir.

Q. Or W. H. Jackson? A. No, sir.

Q. Or Russell Robert Smith? [37]

A. No, sir.

Q. Or George R. Stone? A. No, sir.

Q. Or George W. Thompson? A. No, sir.

Q. Did you ever know him to use the name or know him by the name of W. H. Towner?

A. No, sir.

(Testimony of Helene Marceau Sidebotham.)

Q. Or William Towner? A. No, sir.

Q. Now, at the time you procured your divorce in Nevada, you state in your pleadings in this case, Mrs. Sidebotham, that you did not know whether there was any community property. Do you remember that you signed a complaint for divorce in Nevada?

A. I don't remember. I must have signed something, but I don't remember.

Q. At the time of that hearing of the trial, was there any question asked of you whether there was any community property?

Mr. Monell: I will object on the ground that it calls for hearsay. The record of the court proceedings is the best evidence.

Mr. Trowbridge: I will join in that objection.

The Court: If she knows, she may answer. The objection [38] will be overruled.

A. They never asked me anything about community property.

Mr. Ruiz: Very well.

Q. Did you find out during the course of this case that you had signed a complaint in Nevada and that complaint had said that there was no community property?

Mr. Monell: I will object upon the ground that it is leading, if the Court please, and suggestive.

The Court: She may state whether or not she did. The objection will be overruled.

A. I have been told that I had signed.

Q. (By Mr. Ruiz): Who told you?

(Testimony of Helene Marceau Sidebotham.)

A. My—you did.

Q. Now, when was that?

A. When the case was on; I think it was in July, '53. I was surprised. I didn't know I had signed it.

The Court: It is 12:00 o'clock. We will take a recess until 2:00 o'clock.

(Whereupon, an adjournment was taken to 2:00 o'clock p.m.) [39]

Monday, October 24, 1955—2:00 P.M.

HELENE (MADELINE)

MARCEAU SIDEBOTHAM

resumed the stand.

Direct Examination

(Continued)

By Mr. Ruiz:

Q. I believe you testified that you found out during the course of this case that you had signed a Nevada complaint to the effect that there was no community property and that that was around July, 1953?

A. Yes.

Q. Is that correct?

A. Yes, that's right.

Q. That action in Nevada was on publication, was it?

A. Yes, sir.

Q. Did you know the whereabouts of Mr. Sidebotham?

A. No. I didn't know where he was.

Q. When you last talked to him, did you have a conversation?

A. Yes, I did.

(Testimony of Helene Marceau Sidebotham.)

Q. As to when he would see you? A. Yes.

Q. What did he say?

A. He said for me to wait for him and he will come back, and as soon as he come back we go to South America together. He wanted to buy a plantation and retire.

Q. He told you to stay put, in other words? [40]

A. Yes, he told me to stay—wait for him.

Q. Mrs. Sidebotham, if you had known that Mr. Sidebotham had accumulated money and property, would you have in that Nevada action tried to get your share of it? A. Of course.

Mr. Monell: Just a moment. I will object to that on the ground that it is incompetent, irrelevant and immaterial and argumentative.

The Court: I will allow it.

Mr. Trowbridge: I will join in the same objection.

The Court: Objection overruled.

Mr. Ruiz: I believe the answer is in.

The Court: What is the answer?

A. I said, "Of course."

Q. (By Mr. Ruiz): Why didn't you do anything in this respect?

A. Because he told me he was broke all the time, so what is the use to talk about it.

Q. Did you believe that he was broke all the time? A. I believed him, yes.

Q. Did you know that he was hiding money and property under different names?

Mr. Monell: Just a moment. I will object upon

(Testimony of Helene Marceau Sidebotham.)

the ground that there is no foundation laid, no showing that any money has been hidden. [41]

Mr. Ruiz: I will strike out the word "hiding" and reframe the question.

Q. Did you know that he had any money in names other than Robert Sidebotham?

Mr. Monell: I will object on the ground that that has not been shown.

Mr. Trowbridge: Same objection.

The Court: In what respect has the foundation not been laid?

Mr. Monell: There is no showing that there was any money under any other name or under any name at all.

The Court: It indicates that you are assuming a fact not in evidence.

Mr. Ruiz: Very well. You may cross-examine.

Cross-Examination

By Mr. Trowbridge:

Q. Mrs. Sidebotham, where were you born?

A. In Canada.

Q. Where in Canada?

A. Quebec, Canada; Province of Quebec.

Q. Any particular part? A. St. Mary's.

Q. What is that? A suburb or what?

A. It is outside of the big city. It is not a great big city.

Q. And how old are you?

A. I am born in 1903. [42]

(Testimony of Helene Marceau Sidebotham.)

Q. And when did you come to the United States?

A. 1925. I am not exactly sure; I think it is 1925 or '26.

Q. When did you first meet Mr. Sidebotham?

A. I met him in New York City.

Q. About when? A. 1926.

Q. About 1926? A. About '26.

Q. And what was your occupation then?

A. I was living with my brother. I came to visit my brother and I stayed there for a while.

Q. Did you have any work in New York City?

A. Well, I had a few kids that they wanted to learn how to speak French and I taught a little bit French to the kids and I was keeping house for my brother.

Q. What was the occupation of Mr. Sidebotham then? A. Well, he was selling stock.

Q. Do you know what kind of stock?

A. I don't know anything about stocks. I know he had a stock office—a stock company.

Q. How long did you stay in New York City?

A. We stayed a few months.

Q. "We"—you mean you and Mr. Sidebotham?

A. I stayed at my brother's.

Q. You saw Mr. Sidebotham quite often in New York City? [43]

A. Yes, I was taking care of his mail. I used to go down to his office because he was closing up and he used to say, go and pick up his mail and his messages.

Q. How long did that go on?

(Testimony of Helene Marceau Sidebotham.)

A. Well, if I remember, about six months; maybe less, maybe more. I can't remember.

Q. Where was his office?

A. I believe now that was on 42nd and Broadway or something like that.

Q. He had an office there and you went to his office?

A. Yes, I went to his office.

Q. And opened his mail and received telephone messages from him?

A. I didn't open his mail. I just brought it to him because he was closing up on the outside.

Q. You took messages for him, you say?

A. I took messages from his clerks. He had two or three men over there; he was not alone, and they gave me the letters for him.

Q. That went on for about six months?

A. About. I couldn't say exactly.

Q. And then where did you go?

A. To Boston. He said he had to go to Boston and we going to get married in Boston.

Q. Were you married in Boston? [44]

A. No; he said no, he was busy and we had to go some place else.

Q. Well, were you married in New York City to him?

A. I had never been to a ceremony, no, because he was busy. He said we would go some place else and get married.

Q. You allege in one of your complaints you were married to him in New York City on January 1, 1927. Is that right?

(Testimony of Helene Marceau Sidebotham.)

A. I don't know, sir. It was up to my lawyer to find that out.

Q. Well, you should know whether you were married to him.

A. If you are married to a man you got to go through a ceremony.

Q. You allege in one of your complaints you were married on January 1, 1927. I would like to know more about it.

Mr. Ruiz: Just a minute. For the purpose of an objection, the complaint has been amended to allege the ceremonial marriage, which ceremonial marriage is in evidence. Originally there was a complaint that made reference to a common law marriage as of a prior date. That was stricken from the complaint and is no longer material in this case, and for that reason I have given counsel an opportunity to develop it, but it will not come to anything because it is not alleged in the complaint on file that she was married to him on January 1, 1927, or whatever it was, but that she was married in 1928 in Tijuana. [45]

Mr. Trowbridge: Well, the third amended complaint which is the one that the suit is proceeding under says in paragraph 2 of the third cause of action that she was married to decedent, Robert Sidebotham, on January 1, 1927, and that is why I am asking you something about this marriage.

A. Well, we were here——

Mr. Ruiz: Just a moment, please. Counsel and I have had many discussions about this matter. We

(Testimony of Helene Marceau Sidebotham.)

have even crossed correspondence on this matter and I have gone on record on the deposition in this matter. It has been stipulated that the only marriage involved in here was the ceremonial marriage in Tijuana. Then counsel raised the question that there possibly was an ambiguity. We had more discussion along that line. And then counsel wanted to know whether I was going to waive the prior marriage that was alleged as a common law marriage, and I went on record and said we were waiving it. There is only one marriage involved here. Now, if counsel wants to develop the fact that this lady lived with Mr. Sidebotham before the marriage, it may be all right, but I don't think it is material.

Mr. Trowbridge: I am not going into this because of the fact that they may or may not rely on this marriage, but I am trying on cross-examination to develop a picture here as to her memory and her trustworthiness and so on, et cetera. I think I have a right to go into it. She swore to it in her [46] third amended complaint.

The Court: The objection will be overruled. You may proceed.

Q. (By Mr. Trowbridge): Is it correct to say that this marriage on January 1st, 1927, was what you call a common-law marriage?

A. We were here in 1927. We were not in New York.

Q. No, January 1st, 1927. That was New Year's Day.

A. Yes, we were in San Francisco.

(Testimony of Helene Marceau Sidebotham.)

Q. Apparently you don't remember.

A. I think you said '26.

Q. No; it says in your complaint January 1, 1927, but I will drop it as far as that is concerned.

A. I could check that up easily.

Q. It isn't worth taking up any more time on. You were in Boston how long with Mr. Sidebotham?

A. About six months.

Q. Then where did you go?

A. We came to California.

Q. Where in California?

A. San Francisco first.

Q. About when did you arrive in San Francisco?

A. That must have been about '27 or before '27.

Q. Well, what part of '27, if you can remember, not by day; was it summer, fall—— [47]

A. No, it was during Christmas time.

Q. Well, then, how long were you in San Francisco?

A. Well, he was working here for a company, an insurance company, I believe; then we went to Los Angeles.

Q. How long after you arrived in San Francisco before you went to Los Angeles?

A. How long we lived in San Francisco, you mean?

Q. Yes.

A. Well, we must have stayed a few months because he had to finish up with this other company.

Q. And you went to Los Angeles? A. Yes.

(Testimony of Helene Marceau Sidebotham.)

Q. And I believe that you alleged in another complaint that you were married in Tijuana on May 30th, 1928. Is that correct? A. Correct.

Q. And you have introduced in evidence here a certified copy of your marriage certificate in Tijuana, Mexico. Do you remember what place you gave as your place of birth to the marriage officer in Tijuana? A. Yes.

Q. What place did you say?

A. In Tiajuana.

Q. When you were married, isn't it a fact that the marriage officer—I think his name was Miranda—Francis L. Miranda— [48] ask you where you were born? A. He didn't ask any questions.

Q. Mrs. Sidebotham, I will show you a two-page paper here in writing. A. Yes.

Q. And there is a name there? A. Yes.

Q. I think it is your name. Is that your signature?

Mr. Ruiz: Just a moment, please. For the purposes of an objection, counsel has what purports to be a photostatic copy of some document. There is no proper foundation laid for even examining the document because—I assume that it purports to be some public document—it is not properly identified for the purpose of questioning. It is written in a foreign language; it is not properly authenticated, and for that reason, until such time as a proper foundation for that document is made, I think it is improper to interrogate the witness with respect to the same.

(Testimony of Helene Marceau Sidebotham.)

Mr. Trowbridge: I am simply asking if that is her signature on the bottom.

Mr. Ruiz: I object to that because of the fact that it is a photostatic copy; on the face of it, it is not an original; it appears to be some sort of a photograph. I don't know whether it is superimposed. I don't know anything about this [49] document.

The Court: Can you lay a better foundation?

Mr. Trowbridge: No, your Honor. That is a Mexican document and that is a photostatic copy of it. It is actually a duplicate of this one that is already in evidence.

The Court: Is that in English?

Mr. Trowbridge: No, but I have a translation.

The Witness: In Spanish.

Mr. Trowbridge: This is in Spanish as well as Plaintiff's Exhibit 1, which is the marriage certificate in evidence.

Mr. Ruiz: If this be a duplicate——

Mr. Trowbridge: It is a duplicate.

Mr. Ruiz: I have no objection to reading what is in evidence and what it says.

Mr. Trowbridge: Well, I will get the translation, your Honor.

The Court: Did you put this in evidence?

Mr. Ruiz: I put the certified copy authenticated by the American Consul in evidence.

The Court: I will allow the testimony, limited to the signature.

Mr. Ruiz: No; the certified copy does not have

(Testimony of Helene Marceau Sidebotham.)

any signature on it. There is no signature on this.

The Court: It is identical with the copy that he has offered in Spanish?

Mr. Ruiz: There is a photostatic copy of some document [50] here in Spanish.

Mr. Trowbridge: That is the same thing.

The Court: Photostatic copy of this?

Mr. Trowbridge: Yes, sir; same thing.

Mr. Ruiz: It is not a photostatic copy of this. This is printed.

Mr. Trowbridge: That is the certified copy.

Mr. Ruiz: This is a certified copy of a document. It is authenticated by the American consul under the United States Seal.

Mr. Trowbridge: The wording—it is word for word exactly the same.

Mr. Ruiz: This is a document that has been photographed and appears to be——

The Court: An official document?

Mr. Ruiz: No, it does not appear to be an official document. There is nothing there that indicates it is an official document on the face of it.

Mr. Trowbridge: I will give your Honor the translation of it. It is proceedings of the alleged marriage of the plaintiff.

The Court: I will allow it subject to counsel's motion to strike. You may proceed. I will overrule the objection of counsel.

Mr. Trowbridge: I will ask you if that is a [51] correct translation?

Mr. Ruiz: Am I an expert?

(Testimony of Helene Marceau Sidebotham.)

Mr. Trowbridge: You speak Spanish very fluently, don't you?

The Court: I know that he is a master of Spanish.

Mr. Ruiz: Thank you, your Honor.

Mr. Trowbridge: Possibly, in order to save time, we might leave that until the 3:00 o'clock recess if you want.

Mr. Ruiz: Very well. Here you are, counsel.

Q. (By Mr. Trowbridge): Now, after this marriage on May 30, 1928, you went to Tijuana with Mr. Sidebotham? A. Yes, sir.

Q. And were married there by some Mexican official? A. Yes.

Q. And you had some witnesses, Mr. and Mrs. A. L. Cloud, was it? A. Yes, sir.

Q. And then you returned to Los Angeles?

A. Yes.

Q. And you continued to live in Los Angeles with Mr. Sidebotham for how long?

A. Well, we were there until '35.

Q. You were there in '35. I believe you said this morning that you were happily married to Mr. Sidebotham? A. Sure, we were. [52]

Q. Is that true that in 1930 you were happily married to him?

A. Well, we had little fights but they didn't amount to much.

Q. I see. And that is true from 1930 to 1935, that you were happily married to him?

A. Yes.

(Testimony of Helene Marceau Sidebotham.)

Q. I will show you what purports to be a complaint for separate maintenance, in the Superior Court of the State of California in and for the County of Los Angeles, Madeline Sidebotham, Plaintiff, vs. Robert Sidebotham, Defendant, and I will ask you if that is a correct copy of your signature at the bottom of the last page?

A. Yes. Yes, that is my signature, yes. That is my signature.

Mr. Trowbridge: I would like to read this to the Court.

(Reading.)

I won't read the prayer. And it is signed Manuel Ruiz, Jr. You were her attorney at that time?

Mr. Ruiz: That's right.

Mr. Trowbridge: And the agreement attached to the complaint reads as follows (reading)—

Q. By the way, you also used the name of Madeline, do you? A. Yes.

Mr. Trowbridge (Reading from agreement): I ask that that be introduced into evidence as Defendant's exhibit next in order.

The Court: Let it be admitted and marked. [53]

The Clerk: Defendant's Exhibit C.

(Whereupon, agreement for separate maintenance was received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Trowbridge): By the way, you remember this action now, do you, for separate maintenance? A. Yes, I do.

(Testimony of Helene Marceau Sidebotham.)

Q. Whatever became of it? Did it ever go to judgment? Was it dismissed, or what happened to it?

A. Well, we just forgot about it.

Q. I will show you a letter dated March 3, 1932, which seems to be signed Mrs. R. R. Sidebotham, and I will ask you to please look at that and tell me if that is in your handwriting and signed by you?

A. That is my writing all right; I forgot about it. That is mine.

Q. Is that the envelope the letter was sent in?

A. Yes, sir.

Mr. Trowbridge: All right. Thank you. I would like to read in evidence a letter dated March 3, 1932, addressed, "Dear Mrs. Sidebotham," and in order to make it intelligible I will read the address on the envelope. "Mrs. R. R. Sidebotham, care Mrs. Harry C. Thayer, Haverford, Philadelphia." May I ask you who that Mrs. R. R. Sidebotham is?

A. It was Mr. Sidebotham's signature. [54]

Q. It is his first wife, isn't it?

A. Oh, I beg your pardon. That is his first wife.

Q. It wasn't his sister?

A. Mrs. Thayer is his sister.

Mr. Trowbridge: That's right.

(Reading letter, ending "Mrs. R. R. Sidebotham, 3122 Durango Avenue, Los Angeles, California.)

Q. Was that your address at that time?

A. At that time, yes.

(Testimony of Helene Marceau Sidebotham.)

Mr. Trowbridge: I ask to have the letter and the envelope introduced in evidence.

The Court: Let them be admitted and marked next in order.

The Clerk: Defendant's Exhibit D.

Mr. Trowbridge: The envelope has a cancellation stamp on it, "Los Angeles, Cal., March"—I can't tell whether it is the 6th or the 3rd, but anyway, it is March, 1932.

Q. Did you ever get any answer to that letter?

A. No.

Q. When you and Mr. Sidebotham lived together in Los Angeles, what was his occupation?

A. He had various occupations. He was selling stocks and bonds, real estate.

Q. And did you have any occupation of any kind?

A. Sometimes I helped with him driving cars. I used to take [55] people to tracts and I used to help him driving cars.

Q. When you say "tracts," you mean real estate tracts?

A. Real estate, yes.

Q. And did you help in his office?

A. Sometimes, but he didn't want me in his office much.

Q. What did you do in his office?

A. Well, I answered the phone sometimes and he sent me on some banks sometimes, some errands like that.

Q. Did he have more than one office in Los Angeles?

A. Yes, he had quite a few.

(Testimony of Helene Marceau Sidebotham.)

Q. Can you tell us where they were?

A. He had one on Spring Street; he had one on Alexander Rouillette Building, Hope Street; he had one on Financial Center Building and he had one on Eighth Street.

Q. During what years did he have these offices?

A. It must have been around '32.

Q. How long did you and he stay in Los Angeles? Until what year? A. Until '35.

Q. 1935. Then where did you go?

A. Then we came to San Francisco.

Q. And where did you live in San Francisco?

A. First we lived at the Hansa Hotel.

Q. How do you spell that?

A. H-a-n-s-e. [56]

Q. Hansa Hotel in San Francisco?

A. Yes.

Q. And then where did you live?

A. Then we moved to—it was 1935 I lived there and he went up north. He said he had some business up north. Then he got in trouble. He came back in 1938 and he told me to find another place, that he was in trouble and he had to go to jail and for me to find a place, and then I moved on Union Street.

Q. Actually, after you and he came to San Francisco you and he did not live together very long, did you? A. Well, he was gone all the time.

Q. Wasn't he gone in Stockton a great deal of the time? A. I didn't know that.

Q. Didn't you—do you know it now?

A. Somebody told me now.

(Testimony of Helene Marceau Sidebotham.)

Q. Didn't you know at the time that he had a home in Stockton? A. No, I didn't.

Q. The last time that you said you saw him was in 1941; is that correct? A. That is correct.

Q. Before the divorce that is the last time you saw him. And did you get any letters from him?

A. You mean in San Francisco? [57]

Q. Yes. A. I had letters, yes.

Q. And where are they?

A. I don't know where they are.

Q. You didn't keep them?

A. I left the suitcase full of things; they might have been in there.

Q. Was he supporting you between 1941 and 1946? A. No.

Q. Did you know that he had a home in San Francisco during that time?

A. No, I didn't know it.

Q. Now, in San Francisco, how did you support yourself after 1941?

A. I worked for a real estate company.

Q. Real estate? A. Real estate company.

Q. What was the name?

A. Dempsey Real Estate Company.

Q. When did that start? A. What?

Q. When did you start to work for the Dempsey Real Estate Company?

A. Oh, I started the work when I came back from Los Angeles because we had lived in this apartment there. [58]

Q. That would be about 1935? A. Yes, sir.

(Testimony of Helene Marceau Sidebotham.)

Q. That you started to work for the Dempsey Real Estate Company?

A. Yes, temporary work.

Q. And you worked for them off and on, did you not, until 1946? A. That's it.

Q. And their office is on Sutter Street here in San Francisco? A. Sutter Street, yes, sir.

Q. Then you went to Nevada and you got a divorce in Nevada? A. Yes.

Q. When you returned, what did you do?

A. When I returned I continued to work—yes, to work a little bit for the same company.

Q. Dempsey Real Estate Company?

A. Yes; I worked in hospitals, too.

Q. And did you work for the Dempsey Real Estate Company down to the time when Mr. Sidebotham died?

A. No, not when he died at the time, no.

Q. How long did you work for them?

A. Until nineteen forty—the end of '46.

Q. You were in San Francisco when Mr. Sidebotham died? A. Yes, sir. [59]

Q. And had been here ever since 1946?

A. Well, I have been East; I went East and I stayed quite a ways away; I stayed two years away.

Q. When did you come back to San Francisco?

Mr. Ruiz: Just a moment; I believe that any inquiry subsequent to the death of Mr. Sidebotham——

Mr. Trowbridge: No; you misunderstand me. I am only going down to the date of his death.

(Testimony of Helene Marceau Sidebotham.)

Mr. Ruiz: I haven't made any inquiry so far as this case is concerned subsequent to 1946, and it is immaterial.

Mr. Trowbridge: I think it is very important, your Honor, on the subject of laches to show where she was and what she was doing up to the time she filed the complaint.

The Court: The objection will be overruled.

Q. (By Mr. Trowbridge): You came back from the East about what year, Mrs. Sidebotham?

A. 1948.

Q. And came back to San Francisco?

A. Yes.

Q. And then you lived here from 1948 until the time Mr. Sidebotham died, did you?

A. No, I went back East, and I lived in Canada for six months.

Q. Where were you when he died?

A. I was in San Francisco. [60]

Q. How long had you been here before his death?

A. Oh, I was here maybe about two or three years; I don't know for sure.

Q. About two or three years. How did you learn about his death? A. In a newspaper.

Q. San Francisco newspaper?

A. San Francisco newspaper.

Q. Did you know about his dealing in real estate; that he had—well, you told about his selling lots in real estate tracts?

A. That was kind of a line of business.

(Testimony of Helene Marceau Sidebotham.)

Q. And did you know whether he bought a piece of property in Crescent City?

A. Yes, I know that he did.

Q. What did he tell you about that?

A. That was when we were in Los Angeles.

Q. What did he tell you about that?

A. Well, he said—this is about the time when we got married in Mexico. He said he was going to buy some property in Crescent City, a tract of land, and sell properties anyway, and buy a home and settle down.

Q. He told you on more than one occasion that he was broke, did he not?

A. He told me he was broke all the time. [61]

Q. All the time he told you he was broke, and you believed that, did you? A. I did.

Q. Did you know that in 1950 he bought a piece of real estate in San Francisco for about \$33,000 and that he recorded the deed and that the deed was in his name? A. I didn't know it.

Q. And it was recorded in the Recorder's Office in San Francisco? A. I didn't know that.

Q. At that time you were working for the Dempsey Real Estate Company on Sutter Street, were you not? A. 1950, you mean?

Q. Yes.

A. No; I didn't work for him after '47.

Q. Oh. But you were in San Francisco then?

A. Yes.

Q. You gave a deposition in Los Angeles on February 18th of this year, did you not?

(Testimony of Helene Marceau Sidebotham.)

A. Yes, sir.

Q. And at that time I will ask you if the following questions and answers were given——

Mr. Trowbridge: Have you the deposition?

Mr. Ruiz: Yes.

Mr. Trowbridge: Page 7, line 6: [62]

“Q. Where do you reside?

“A. El Descanso, Baja California, Mexico.

“The Notary: El Descanso?

“The Witness: E-l D-e-s-c-a-n-s-o.

“Q. (By Mr. Rogers): Is El Descanso a town?

“A. It's a ranch.

“Q. A ranch? A. Yes.

“Q. How far from Tijuana is that ranch?

“A. Oh, it's about 25 miles.”

Q. Is that the testimony you gave in answer to those questions on February 18, 1955?

A. Yes, sir.

Q. Isn't it a fact that you never were——

Mr. Ruiz: Counsel, will you please show the testimony that you read from so that she could read all the testimony and that you might refer to all the testimony on that subject here?

Mr. Trowbridge: I think it is all there.

Mr. Ruiz: It is not.

Mr. Trowbridge: Well, you can amplify it. That is all I want to ask her.

Mr. Ruiz: Well, please let the witness read from here on, when you read anything like that, and have her read all the testimony on the subject. I think that is the proper procedure.

(Testimony of Helene Marceau Sidebotham.)

Mr. Trowbridge: That is all. [63]

Mr. Ruiz: Now, counsel, she very obviously states that she was down there for her health, she was down there temporarily.

The Witness: I was down there one month.

Q. (By Mr. Trowbridge): Isn't it a fact that you were never in El Descanso or never in Mexico except in Tijuana when you were married?

A. I was there about a year ago for my health for one month and I came right back.

Q. Where were you then?

A. El Descanso.

Q. What hotel were you living at?

A. It is a ranch.

Q. It is a ranch? A. Near Tijuana.

Q. Who is the owner of the ranch?

A. Pardon?

Q. Who is the owner of the ranch?

A. The owner of the ranch is Mr. Ruiz.

Q. How do you spell the name?

A. R-u-i-z.

Q. You mean your attorney, Manuel Ruiz, Jr.?

A. Yes.

The Court: Do I understand that you have a ranch in Mexico 28 miles from Tijuana? [64]

Mr. Ruiz: Yes, your Honor.

The Court: How many acres?

Mr. Ruiz: About 48,000 acres.

The Court: What are you doing here?

Mr. Monell: That is a fair question.

The Court: Do you cultivate an acre of it?

(Testimony of Helene Marceau Sidebotham.)

Mr. Ruiz: Yes, I have wheat, I have barley, I have beans—mostly dry farming. Then I have some tenants that have some cattle and some sheep.

The Court: That is a security measure you are engaged in?

Mr. Ruiz: Yes, indeed.

The Witness: It is very beautiful.

Mr. Trowbridge: I will show you a complaint in an action in the First Judicial District Court of the State of Nevada in and for the County of Ormsby, Madeline Sidebotham, Plaintiff, vs. Robert Russell Sidebotham, Defendant. This is a photostatic copy, and on the second page appears your signature, and I ask you if that is a correct copy of your signature? A. It is.

Mr. Trowbridge: I will ask that this be admitted in evidence as Defendant's Exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit E admitted and filed in [65] evidence.

(Whereupon, photostatic copy of complaint was received and marked Defendant's Exhibit E.)

Mr. Trowbridge: I desire to read to the Court at this time from the complaint paragraph IV on the first page, and the whole of the paragraph reads as follows:

"That there is no community property to the plaintiff and defendant hereto belonging."

(Testimony of Helene Marceau Sidebotham.)

The Court: I don't get the full import of that. Read it again.

Mr. Trowbridge: "IV. That there is no community property to the plaintiff and defendant hereto belonging."

Mr. Ruiz: Do you have a transcript of the evidence in that case, counsel?

Mr. Trowbridge: I think not.

Q. Did you ever hear of Mr. Sidebotham getting a divorce in the state of Wyoming?

A. I never did before.

Q. You never heard of it? A. I do now.

Q. On November 2nd, 1940, or at any time—you never heard of his getting a divorce in Wyoming at any time; is that correct?

A. Not before, no. [66]

Q. What?

A. I know now but I didn't know at that time; he didn't tell me.

Q. Until now you had never heard of it, is that it?

A. Oh, I heard about it since Mr. Ruiz told me.

Q. When did he first tell you about that?

A. When he was informed, when you told him.

Q. When did he first tell you about it?

A. Well, it is when I went down to his office and he heard about you—he heard it some place.

Q. Let's see; he has been your attorney since about 1931 or '32 and this happened in November 2nd, 1940. Did he tell you about it in 1940 or in 1941, or when did he tell you about it?

(Testimony of Helene Marceau Sidebotham.)

A. Well, he told me in 1951 when he died—after he died Mr. Ruiz informed me.

Mr. Trowbridge: I will offer in evidence now, your Honor, a certified copy of the petition for divorce in the state of Wyoming, county of Albany, in the district court of the Second Judicial District, entitled, Robert R. Sidebotham, Plaintiff vs. Madeline M. Sidebotham, Defendant, and it is all together under one heading. The petition, affidavit for publication of notice, summons, affidavit of publication of summons, affidavit of publication of notice of taking deposition and deposition of Louise Moran, and the decree. I ask [67] that it be admitted in evidence as exhibit next in order.

The Court: Let them be admitted and marked.

The Clerk: Defendant's Exhibit F admitted and filed in evidence.

The Court: Pardon me; what is the date of that petition?

Mr. Trowbridge: The petition is dated the 6th of August, 1940, and the decree is dated November 2nd, 1940, six years before the Nevada divorce.

I think it is near the 3:00 o'clock recess time.

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Trowbridge): Mrs. Sidebotham, you saw Mr. Sidebotham once after you had obtained your divorce in Nevada, did you not?

A. Yes, sir.

Q. And when and where was that?

(Testimony of Helene Marceau Sidebotham.)

A. In 1947.

Q. And where? A. On the street.

Q. And how was he dressed at the time?

A. He was well dressed.

Q. Did you tell him that you needed money?

A. Well, I asked him if he could pay me that \$100 back, and he said he was broke. So he took me to lunch and he couldn't pay it. [68]

Q. Did he tell you where he was living then?

A. No.

Q. Did you ask him?

A. He said he was going up north, he was traveling, and he had been East and he is going to go on a——

Q. Did you ask him where he was living?

A. I don't remember if I did.

Mr. Trowbridge: We have stipulated now, I believe, that this translation of the marriage certificate that I hold is a correct translation.

Mr. Ruiz: Yes.

Mr. Trowbridge: And I will ask that that be introduced in evidence. It is an English translation of the marriage certificate.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit G admitted and filed in evidence.

(Whereupon, translation of marriage certificate was received in evidence and marked Defendant's Exhibit G.)

Mr. Trowbridge: This is a copy of the certified

(Testimony of Helene Marceau Sidebotham.)

copy of the marriage certificate, and I would like to read from it for a moment.

After the introduction by the judge, it continues:

“And immediately went on proceeding to drawing [69] up of this record whereby it appears that the personal data are as follows: Robert Russell Sidebotham, 40 years old, divorced, dealer, Protestant, a native of Colorado, son of Robert A. Sidebotham and Elizabeth Sidebotham; Helen Delaire Marceau, 22 years old, single, secretary, native of Lyon, Francaise.”

Q. Do you know where Lyon is in France? Were you born in France in a town called Lyon?

A. I know the name but I never been there.

Q. You have never been there and you weren't born in Lyon, France?

A. No, sir; he put that himself.

Mr. Trowbridge: In order to save time, may we introduce the deposition of this witness, of Mrs. Sidebotham, in evidence? The original is here, is it not?

Mr. Ruiz: No, I don't think that it is proper to introduce any deposition in evidence.

Mr. Trowbridge: Very well. That is all for the time being, your Honor. Co-counsel might have some questions.

(Testimony of Helene Marceau Sidebotham.)

Cross-Examination

By Mr. Monell:

Q. Mrs. Sidebotham, you stated that you lived at the Hansa Hotel in San Francisco?

A. Yes, sir.

Q. That was in 1941. Is that when you moved to the Hansa [70] Hotel? A. Not '41; 1935.

Q. 1935. I think you testified that you were at the Hansa Hotel the last time you saw him; isn't that it?

A. I saw him many times, of course, but last time I saw him in 1941.

Q. 1941. That was at the Hansa Hotel?

A. No, that was on Union Street.

Q. When did you live in the Hansa Hotel?

A. 1935.

Q. And up until what time? A. '39.

Q. Do you remember who the owners of the hotel were when you were there? Who ran the place? A. Yes, I do.

Q. Who were they?

A. Mr. and Mrs. Pratt.

Q. You testified on your direct examination that the last time you saw him was in 1941 on Union Street. That was at No. 380 Union Street, correct?

A. Correct.

Q. And you didn't know where he stayed after that? A. No.

Q. And at that time where were you living?

A. 380 Union. [71]

(Testimony of Helene Marceau Sidebotham.)

Q. And where were you in 1941?

A. 380 Union.

Q. Same place? A. Yes.

Q. Was it 318 Union or 380? A. 380.

Q. 381. And I understood you to say at one time on your direct examination that you were at the De Anza Hotel; I understood you to say that was the Hanse?

A. Hanse. Yes, I had made a mistake myself, H-a-n-s-e.

Q. In San Francisco? A. Yes.

Q. There is a hotel in San Jose, the De Anza; I thought you were referring to that. A. No.

Q. You have never lived in San Jose?

A. No.

Q. Now, you mentioned that you were happily married between 1930 up until 1935, I think you said. Do you know a Mr. Lapsey? A. Yes.

Q. Were you ever married to him?

A. No, sir.

Q. Were you ever living with him down in Arrowhead? A. No, sir. [72]

Q. Did you have a place at Lake Arrowhead?

A. Well, we had a little cabin there.

Q. Who is we, you and Mr. Sidebotham?

A. Mr. Sidebotham, yes.

Q. Do you recall when that was?

A. What?

Q. Do you recall when that was, what year?

A. It was when we came here, '28 or '29, I guess; yes, '28 up to '35 we used to go up there.

(Testimony of Helene Marceau Sidebotham.)

Q. You used to go up there from here, is that it?

A. From Los Angeles.

Q. Did you live in Los Angeles at that time?

A. Yes.

Q. That was before you moved up to San Francisco?

A. Yes.

Q. Did that property belong to you or did it belong to Mr. Sidebotham or both of you?

A. No; it was a rented place.

Q. Did you stay there alone?

A. Well, sometimes. He used to go down for his business in Los Angeles; he would come over.

Q. Who was Mr. Claude Lapsey?

A. He was a neighbor.

Q. Did he have a place next door?

A. Yes, with his niece and nephew. He was an old man, he [73] was crippled.

Q. And that was——

A. 28 by two.

Q. ——December, 1931, would you say the latter part, around Christmas time?

A. We started going up there in '28 or '29 right after we got married, and we went up there all the time.

Q. Would you say you were there on or about the 21st of December, 1931?

A. I wouldn't know exactly the date, but we were there quite often.

Q. A little before Christmas of that year?

A. I guess; we were going there all the time.

Q. Were you there on or about the latter part of April, 1932?

A. We had a place there.

(Testimony of Helene Marceau Sidebotham.)

Q. Pardon? A. We had a place there.

Q. You had that place at that time and you used to go up there occasionally?

A. Well, I don't know exactly what date we rented the place.

Mr. Monell: I see. All right; thank you, very much.

Redirect Examination

By Mr. Ruiz:

Q. Mrs. Sidebotham, you said you were happily married to your husband. Why did you sue him for separate maintenance? [74]

A. Well, I didn't want to lose him; I just loved him, I guess.

Q. You stated that he mistreated you and that he humiliated you? A. Yes, he did, but——

Q. And that he embarrassed you?

A. Yes, sir.

Q. Did you continue to love him?

A. Well, I must have been crazy, but I loved him just the same.

Q. Was he the first man that you ever had?

A. Yes.

Q. Later on, as far as this particular tiff in court was concerned, you became reconciled?

A. Yes, we did at that time.

Q. You continued to live together?

A. Yes, at that time.

Q. Pardon? A. Yes.

Q. Now, you said something about Lyon,

(Testimony of Helene Marceau Sidebotham.)

France; you said he put it himself. What did you mean by that—in that marriage application?

A. Well, I didn't see the papers since lately. He said—he did everything and he did that because he wanted to make me a movie star. He said he was going to put me in the movies. [75] He wanted to put me in the movies; he had a test made out of me here in Burlingame, I guess. I don't know.

Q. When you met him in New York he brought you to Hollywood, didn't he?

A. Well, first, we went to Boston.

Q. When you came out here you ended up in Hollywood, didn't you? A. Pardon.

Q. When you came west—— A. Yes?

Q. ——you went to Hollywood to live?

A. Yes.

Q. Why did he take you there?

A. He wanted to make a moving picture out of me.

Q. He wanted to make a star out of you; that is what he told you?

A. Yes; he had my picture in the paper, too; said I was from France.

Q. And that was his idea? A. Yes.

Q. When you saw him in 1947 you say you met him on the street? A. Yes.

Q. You said he was well dressed?

A. Yes. [76]

Q. How did he dress?

A. Oh, he dressed very neatly, and he had a brown suit.

(Testimony of Helene Marceau Sidebotham.)

Q. I mean when you were living together, when he was with you, how did he dress?

A. Oh, he dressed well—very well.

Q. Did he always dress well?

A. Well, yes. Oh, yes, he was very particular.

Q. Was this true even though he was broke?

A. Well, he managed to get dressed anyhow; he gets up early in the morning and was very particular.

Mr. Ruiz: I would like to offer into evidence a transcript of the proceedings in the case of Madeline Sidebotham vs. Robert Russell Sidebotham in the First Judicial District of the State of Nevada, as well as the final judgment of divorce as entered in that particular case. I would like to read the transcript of proceedings into evidence.

The Court: Let them be admitted and marked.

The Clerk: Plaintiff's Exhibit 3 admitted and filed in evidence.

(Whereupon, transcript of proceedings was received into evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Ruiz: The transcript of proceedings as Plaintiff's Exhibit 3 and the judgment as Plaintiff's Exhibit 4.

The Clerk: Plaintiff's Exhibit 4 admitted and filed in [77] evidence.

(Whereupon, the judgment referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of Helene Marceau Sidebotham.)

(Mr. Ruiz thereupon read Plaintiff's Exhibits 3 and 4 to the Court.)

Mr. Ruiz: That is all to indicate there was no question of property that was gone into as alleged in the pleadings.

Q. Now, Mrs. Sidebotham, calling your attention to a date that says June 30, 1931, that appears in this transcript, did you testify June 30th, 1931, or some other date?

Mr. Monell: I will object on the ground that that is an improper attempt to impeach a record.

Mr. Trowbridge: I will join in the objection.

The Court: Is there an exception to the rule? He challenges the record. I will allow it subject to a motion to strike, and overrule the objection, so that you may have a record.

Q. (By Mr. Ruiz): What did you testify?

A. I said June, 1941.

Q. Very well.

A. Because he was coming over to my house.

Q. That is all right. Did you ever discuss, when you were running errands for your husband, any of his business affairs with him? [78]

A. No, I didn't discuss it.

Mr. Ruiz: No further questions.

(Testimony of Helene Marceau Sidebotham.)

Recross-Examination

By Mr. Trowbridge:

Just a moment, please.

Q. Mrs. Sidebotham, I will show you Defendant's Exhibit E in evidence here and I ask you if that is your signature on the second page and if you swore to that? A. That is my signature.

Q. All right. I will read the complaint, paragraph V, photostatic copy of the complaint signed and sworn to by Madeline Sidebotham:

"V. Plaintiff brings this action to secure a judgment for a decree of divorce from the defendant and as cause therefor alleges that for more than three consecutive years just prior to the filing of the complaint in this action, to wit: Since on or about June 30, 1931, at Los Angeles, California, the plaintiff and defendant lived separate and apart from each other without cohabitation; that said separation still continues."

Were you living in Los Angeles, California, on June 30, 1931? A. Yes, sir—'31.

Mr. Trowbridge: That is all.

Mr. Ruiz: No further questions.

The Court: Step down. [79]

Mr. Ruiz: Just a minute now.

(Testimony of Helene Marceau Sidebotham.)

Redirect Examination

By Mr. Ruiz:

Q. By the way, when you went to this office in Nevada, whom did you first meet?

A. First, I met the two girls at the office.

Q. You met the two girls in the office?

A. Yes.

Q. Did you see this lawyer, Frame, there?

A. No, sir.

Q. Did you talk to him? A. Yes, sir.

Q. At that time? A. Yes, I did.

Q. Now, you say you met the two girls. You met him, also?

A. Oh, no; not him; no; he wasn't there.

Q. And what did you do at that time?

A. Well, she asked me a few questions and I answered my name, and she asked me where—if I knew where he was. I said I didn't know.

Q. And then what else?

A. And then talked about the price, and she said for me to come back again.

Q. Did you thereafter come back a second time?

A. Yes, sir; I did.

Q. At that time did you talk to the lawyer? [80]

A. No, I didn't do that, because he was a sick man; he wasn't there.

Q. When is the first time you talked to the lawyer, if you talked to him?

A. Pardon me; it is about two days before we went to Carson City.

(Testimony of Helene Marceau Sidebotham.)

Q. Is that where the divorce was granted?

A. Yes, because I have the receipt here put in the back, "You better come for appointment for a couple of days." I have the receipt.

Q. All right. Then where did you go?

A. We went to Carson City.

Q. Did you see the lawyer then? A. Yes.

Q. Where was he, in Carson City?

A. Well, I saw him in court.

Q. You saw him in the courtroom?

A. Oh, no; I saw him in his office a couple of days before we went to Carson City.

Q. You saw him in his office?

A. Yes, I did.

Q. Did you have a conversation with him?

A. Well, some; not much.

Q. What conversation do you remember having with him?

A. Well, he asked me—I couldn't understand him very well, [81] he was paralyzed and I couldn't understand so well his language.

Q. You couldn't understand so well his language

A. No; he was kind of an old, sick man.

Q. Is that the first time you saw him, just two days before you went to court?

A. Yes, that is the first time—the last time before I went to court. I saw him in court.

Q. The second time is when you saw him in court? A. Yes, sir.

Q. And when you got to court, did he question

(Testimony of Helene Marceau Sidebotham.)

you? A. Oh, yes; he questioned me.

Q. Now, I believe you stated that you came up here to San Francisco in what year?

A. 1935.

Q. 1935. How did you happen to go to the Hansa Hotel?

A. Well, my husband came here on business, and he said, "You stay there; I will come back for you." He had business up north.

Q. He usually travelled around; is that it?

A. Yes, all the time.

Q. And there he paid the rent; is that correct?

A. At the Hansa, I don't know if I paid or he paid. I paid. I know I paid.

Q. Where did you get the money? [82]

A. He give me the money for the rent.

Q. I see. And then later on you went and lived at the Union Street address? A. Yes.

Q. Did he come over there and visit you?

A. Yes.

Q. And did he have relations with you there?

A. I have some up at the landlady upstairs.

Q. No, no. Did he have personal relations with you as husband and wife?

A. Well, he stayed at home sometimes.

Q. Did he do the same thing over at the Hansa Hotel?

A. Oh, yes, he had some clothes and stayed there. He had to go on business up north.

Q. The question is, did he cohabit with you as husband and wife? A. Yes.

(Testimony of Helene Marceau Sidebotham.)

Q. Now, you said you didn't know that he had gotten a divorce in Wyoming in August, 1940. Where were you living in August, 1940?

A. On Union Street; 380 Union.

Q. Did he know your residence there?

A. Sure.

Mr. Ruiz: This divorce, if the Court please, is on substituted service that has been introduced here as [83] Defendant's Exhibit F. It is predicated on an affidavit to the effect that the plaintiff does not know the whereabouts of Mrs. Sidebotham, on the fact that her residence is unknown, and it has a decree that says as follows:

"And it appearing to the Court that due and regular service has been made and had on the defendant by publication, and proof of which publication is filed herein; and it appearing further from the affidavit of the plaintiff that he has exercised due diligence and inquiries as to the whereabouts of the defendant; that her residence is unknown and cannot be with reasonable diligence ascertained; and the defendant being in default for want of an answer or other appearance herein, and the plaintiff being in court personally with his attorney and the deposition of the witness having been presented and the plaintiff having testified in support of the allegations of his petition——"

whereupon a decree of divorce was granted to him upon those representations which are jurisdictional.

You may recross.

Mr. Trowbridge: No questions.

(Testimony of Helene Marceau Sidebotham.)

Recross-Examination

By Mr. Monell:

Q. Mrs. Sidebotham, where did you say you [84] were living in 1941? A. 380 Union Street.

Q. You testified a few minutes ago on your cross-examination that you lived at the Hansa Hotel from 1935 to 1938, and then you moved to the Union Street address? A. Correct.

Q. How long did you live there?

A. On Union Street?

Q. Yes. A. I lived there until 1942.

Q. Up until 1942? A. Yes.

Q. You have testified that you did not see your husband since 1947; that was the last time you saw him? A. Yes.

Q. And you hadn't seen him prior to that excepting in 1941? A. That's it.

Q. Where did you see him in 1941?

A. At Union Street, 380 Union.

Q. And what was he doing at that time?

A. Wait a minute, 380 Union—I don't remember if it was 1941, really, if I saw him; I know I lived at Union Street. Yes, that's it; I saw him in 1941, yes.

Q. Did he call upon you at that time?

A. Yes, he called on me and he told me to wait for him. [85]

Q. Did he stay at your place then that night?

A. Yes, and he brought me a machine, a sewing

(Testimony of Helene Marceau Sidebotham.)

machine, and he said, "You make some clothes; when I come back we go to South America."

Q. When was that in 1941? A. In 1941.

Q. When? A. Summer time.

Q. When? What part of the summer time?

A. Well, I know it was summer time, but I can't recall the date.

Q. What was he doing at that time?

A. Well, he was selling bonds or stocks, a salesman, trying, he said, to make money.

Q. What company was he working for?

A. He didn't tell me.

Q. How long did he stay in town on that trip?

A. Well, that day he stayed all day. He stayed all day that day.

Q. Weren't you working at that time?

A. No, I work only temporary, you know, to show some property some time. I open up property. They had some place for sale, and then they call me up. I was cleaning up the place and showing it.

Q. Did you take the day off when he came up to see you? [86] A. Yes.

Q. Is that all you took off, that one day?

A. I guess so, yes.

Q. When was the time you had seen him before that?

A. I would see him occasionally. He knew where I lived. He come in and he goes.

Q. When did you see him before the summer of 1941?

(Testimony of Helene Marceau Sidebotham.)

A. Well, he knew where I was when I moved from the Hansa in nineteen thirty——

Q. I'm not asking that. I am asking you what you knew now, Mrs. Sidebotham. When did you see him before the summer of 1941?

A. I see him three or four months before that, in 1940. He know where I was.

Q. When did you see him in 1940?

A. At the Union Street. That is where I was living.

Q. Was he working for the same company all this time?

A. I don't know if he was working for a company; he was working for himself.

Q. What money did he send you during that time, if any?

A. Well, he didn't send me much.

Q. How much?

A. One time he sent me \$10 and he paid the rent.

Q. Did he pay the rent all along at the Union Street place?

A. Most of the time. If I was not there he would go himself. [87]

Q. How often would he send you money, \$10 or so?

A. Oh, I can't remember that. He will give it to me when he came.

Q. How frequently? Did you get a hundred dollars a year?

A. Oh, no.

Q. Or a thousand dollars a year?

(Testimony of Helene Marceau Sidebotham.)

A. I say no.

Q. How much?

A. Just pay the rent, \$19 a month, and he said he was broke, he was trying to make a living.

Q. Did he always take you out to dinner when he came in town? A. Oh, yes, he did that.

Q. Where did he take you to dinner on this occasion in 1947, the last time you saw him?

A. Well, that time he was coming at the Hansa.

Q. In 1947?

A. No, he was coming right at Grant Avenue and Bush Street, that's it.

Q. That is where the Hansa is, between Grant and Bush? A. Yes.

Q. Grant and Kearny, isn't it? A. Yes.

Q. Was he staying at the Hansa Hotel, or were you? A. No. [88]

Q. Where were you living in 1947?

A. In 1947 I was living on Franklin Street.

Q. Were you living alone at that time?

A. Yes.

Q. And where did you have dinner or lunch when he took you out in 1947, the last time you saw him? A. Pardon?

Q. Where did he take you?

A. Oh, he took me at the corner there, that little place—you know that little place there on the corner.

Q. You mean that little sandwich store up there? A. Yes.

Q. Which corner?

(Testimony of Helene Marceau Sidebotham.)

A. Near the Astoria Hotel. That is small place there; I don't know the name of that place.

Q. How long did you stay there for lunch, do you recall? A. Oh, just a short time.

Q. Did you tell him then that you had divorced him? A. Yes, I did.

Q. What did he say to that?

A. Well, he said, "I didn't know," and "It's too bad." He said, "I wish you good luck." And he said, "I don't think I was any too good," and all that.

Q. Didn't he tell you he had divorced you himself in Wyoming?

A. No, he didn't say a word about that. [89]

Mr. Monell: I think that is all.

Mr. Ruiz: That is all.

The Court: We will take a recess until 10 o'clock tomorrow morning. [89-A]

Tuesday, October 25, 1955

The Clerk: Sidebotham vs. Katz, further trial.

HELENE MARCEAU SIDEBOTHAM
the plaintiff herein, resumed the stand and testified further as follows:

Further Redirect Examination

By Mr. Ruiz:

Q. Who is Lois Umbsen?

A. She is Mr. Sidebotham's sister.

(Testimony of Helene Marceau Sidebotham.)

Q. While you were married to Mr. Sidebotham did you ever receive any communications, telegraphic or correspondence, from her?

A. Yes, I did.

Q. Did you ever receive any communication from her when you were living at the Hansa Hotel in San Francisco?

A. Yes, I did.

Q. I will show you an envelope marked Ardmore, Pennsylvania, dated February 15th—rather, postmarked February 15, 7 p.m. 1939, addressed to Mrs. Madeline Sidebotham, 447 Bush Street, San Francisco, California, and ask you if you recognize that envelope?

A. Yes, I do.

Q. And that was sent to you by her?

A. Yes.

Mr. Ruiz: I would like to offer this into evidence at [90] this time as Plaintiff's next exhibit in order.

The Clerk: Plaintiff's Exhibit 5 admitted and filed into evidence.

(Whereupon envelope referred to above was received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Monell: Just the envelope—that is all you are introducing?

Mr. Ruiz: That is all I am introducing at this time.

Q. Yesterday you testified that you sued your husband in a suit for separation and you related in your complaint that he treated you cruelly. When did he do that?

(Testimony of Helene Marceau Sidebotham.)

A. Only when he was introxicated.

Q. Only when he was intoxicated?

A. Yes.

Q. After you became reconciled, did he drink like he did before? A. No, he didn't.

Mr. Ruiz: You may cross-examine as to the last two questions.

Mr. Monell: No questions. [91]

DANIEL J. BYRNE

a witness called on behalf of the plaintiff; sworn.

The Clerk: State your full name, your occupation and your address to the Court.

A. Daniel J. Byrne, manager of the safe deposit vaults, Savings Union Branch, American Trust Company.

Direct Examination

By Mr. Ruiz:

Q. Are you here in response to a subpoena, sir?

A. Yes, sir.

Q. And did you bring some records with you?

A. Yes, sir. (Producing documents.)

Q. Now, those records to which reference is made, are they records of your banking institution?

A. Well, the first two—the first one is not. That is from a bank that used to be at 26 O'Farrell Street.

Q. With respect to the bank at 26 O'Farrell Street, did you purchase that or merge with it?

A. We purchased that on September 8th, '44.

(Testimony of Daniel J. Byrne.)

Q. And in connection with the purchase did you take over assets? A. Yes.

Q. And safety deposit boxes and other things that belonged to the former institution?

A. Yes, sir. [92]

Q. And that is one of the official records of the institution that you purchased?

A. Yes, sir.

Q. Now, referring to the first record, that is dated January 9th, 1943, and makes reference to a safety deposit box No. 1861 for an annual rental of \$3.00.

Mr. Trowbridge: Just a moment, please. We are going to object to any reference to that document on the ground that it is hearsay, and not the best evidence, there is not proper foundation laid for it. They should produce an officer of that particular bank if they want to introduce it. This gentleman—he has shown that he doesn't know anything about it and it was not a part of the records of his bank, incompetent, irrelevant and immaterial.

Mr. Monell: We will join in the objection, if the Court please.

The Court: For the purpose of the record, the objection will be sustained.

Q. (By Mr. Ruiz): Now let's get back to the Security Safe Deposit Company. Pardon me. What did you say your occupation was?

A. Manager of the safe deposit vaults.

Q. You are manager of the safe deposit vaults?

A. Of the American Trust Company.

(Testimony of Daniel J. Byrne.)

Q. Does that vault contain a box which is numbered 1861? [93] A. Yes; it does now, yes.

Q. And as manager of the safety deposit section are those boxes under your supervision?

A. Yes, sir.

Q. And do those boxes have records with respect to persons that have rented them?

A. Yes, sir.

Q. And are those records under your control?

A. Yes, sir.

Q. And are they records made by your banking institution and its predecessor in privity and interest in the course of regular banking business?

A. Yes.

Q. And is this one of those records that you have? A. Yes, sir.

Q. And are you able to identify it as a record that you have under your supervision and your control? A. Yes, sir.

Q. All right. Now, I notice that this particular record or this particular Security safe deposit box bears a date January 9, 1943.

Mr. Trowbridge: Just a moment. I renew the objection. He is reading from the same document which I objected to and to which your Honor has sustained an objection, and I object to any further reference to that or any question about it. [94]

Mr. Ruiz: Well, I added the additional foundation that you took objection to, sir.

Mr. Trowbridge: Well, I still maintain, your Honor, that this is a record of a bank that is out

(Testimony of Daniel J. Byrne.)

of business, that this gentleman was not connected with, and unless he can show that he was an employee of that bank at the time that these records were made and they were under his control in 1943—and I don't think this gentleman can so testify——

Mr. Ruiz: All we need to show is that this gentleman is a manager of a particular department and that that department has records, no matter how far back they go as long as there was direct privity with respect to the keeping of records of that particular safety deposit area.

Mr. Trowbridge: It is an entirely different box and a different bank, your Honor.

Mr. Monell: We join in the objection, if the Court please.

Mr. Trowbridge: I will add that it is immaterial, irrelevant and incompetent.

Mr. Ruiz: I think a proper foundation has been laid.

Mr. Trowbridge: May we ask the witness a question, your Honor?

The Court: Certainly.

Q. (By Mr. Trowbridge): Mr. Byrne, you are an employee of the American Trust Company? [95]

A. Yes, sir.

Q. Manager of the safe deposit department. How long have you been such? I mean how long have you been an employee of that bank.

A. Forty-three years.

(Testimony of Daniel J. Byrne.)

Q. Were you ever in any way connected with the Security Safe Deposit Company?

A. No, sir.

Q. And where was that bank located?

A. No. 26 O'Farrell.

Q. Was it in the same building your bank is located? A. No, a little alley between it.

Q. Was it a different institution? A. Yes.

Q. Independent from American Trust?

A. Yes.

The Court: Until they took them over?

A. Before that.

Q. (By Mr. Trowbridge): There is a safe deposit box there numbered 1861 of the Security Safe Deposit Company. Do you as an employee of the American Trust Company have any such safe deposit box No. 1861? A. Yes, we have.

Q. No, I mean corresponding to that box.

A. Well, it all depends upon the numbers of those cards [96] there, how they run down; there have been changes. I don't carry in mind what those changes are, but they plainly show when it is rented, when surrendered, when the changes were made and for what reason it was done.

Q. I show you this paper again and ask you to look at the ink insertions where the blanks are filled out in ink; is that your handwriting?

A. No, that is Mr. Jones', the gentleman that managed that at that time.

Q. In other words, those are in the handwriting of an employee of the Security Safe Deposit Com-

(Testimony of Daniel J. Byrne.)

pany and not of an employee of the American Trust Company? A. Yes.

Mr. Trowbridge: I think, your Honor, that we have showed that there is no foundation there.

The Court: In what respect hasn't the foundation been laid?

Mr. Trowbridge: Because it is a separate bank, a separate independent bank; no employee of the American Trust Company has filled out any of the blanks on this form. It is purely hearsay, entries by third persons in another bank, and I don't see how that can possibly be admissible.

The Court: Pass it up. Now indicate for the purpose of the record the purpose of this offer.

Mr. Ruiz: For the purpose of showing that the party [97] identified there under the name of Towner who opened the safe deposit box is tied with the decedent in this action to show that it was an alias adopted by the decedent and that the property therein contained belonged to him.

The Court: I will allow it subject to a motion to strike and overrule your objection. Unless it is connected up it will go out.

Mr. Ruiz: At this time I would like to offer this contract dated January 9th, 1943, in evidence.

The Witness: Can I supply a photostatic copy instead of the original?

The Court: He wants to know if he can supply a photostatic copy instead of the original.

Mr. Ruiz: I have no objection.

Mr. Monell: We have no objection.

(Testimony of Daniel J. Byrne.)

The Clerk: Plaintiff's Exhibit 6 admitted and filed in evidence.

(Safe deposit record admitted and received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Monell: What is the name of the predecessor of the company?

Mr. Ruiz: Security Safe Deposit Company.

Q. Now, I notice in your testimony you stated that these various instruments are chained up in some way. Can you refer to the four instruments I am handing you and ask if after this [98] box in January, 1943, was opened whether there was another card with respect to the same box issued by the bank.

A. Well, this particular card was issued by the people that owned the building and they took it away from those people.

Q. Now you are referring to a blue card?

A. Yes; that is still at 26 O'Farrell.

Mr. Trowbridge: We object to this on the same grounds, no proper foundation laid, hearsay, not a business record maintained by the American Trust or by this gentleman.

The Witness: We used that card.

Mr. Trowbridge: Just a moment, please. And that it is irrelevant, immaterial and incompetent.

The Court: I will allow it subject to the same ruling. Overrule the objection.

Mr. Monell: We join in that objection.

The Court: Let the record so show.

(Testimony of Daniel J. Byrne.)

Q. (By Mr. Ruiz): Your attention is called to the fact that this is dated 4/24/44 and that it refers to safe No. 1861 and is called "Individual lease agreement, access by lessee only, W. H. Towner." Can you state from the amount of the rental and your experience as manager of those vaults whether the vault or box was the same size or whether it was larger?

A. No, both the same size; both the same box.

Q. Both the same size and both the identical box? A. The same box. [99]

Mr. Ruiz: I would like to offer the photostatic copy of the instrument to which reference I have made in lieu of the original.

The Court: Let it be admitted as next in order.

Mr. Ruiz: By stipulation, if I may.

Mr. Trowbridge: Yes, subject to the same objection, except we won't object to the photostatic copy.

Mr. Monell: We join in the stipulation.

The Court: Are you supplying photostatic copies now?

Mr. Ruiz: Yes.

Mr. Monell: You mentioned a blue card. Is there some other identification?

Mr. Ruiz: Yes. The blue card will be the one which is being offered at this instant by the plaintiff.

Mr. Monell: It is labeled "Individual Lease Agreement" and dated May 22, 1945. Would that be the one you are referring to?

(Testimony of Daniel J. Byrne.)

A. May 24th——

Mr. Monell: That is April.

The Witness: That is the date it was surrendered.

The Court: That is the date of surrender?

A. The latter date is the date of surrender.

Q. (By Mr. Ruiz): April 24, 1944.

A. There is two cards in that picture.

Mr. Monell: This is called "Individual Lease Agreement" [100] and the top part is the back of the card and the bottom part is the front; is that it?

The Witness: Yes.

The Clerk: Plaintiff's Exhibit 7 admitted and filed in evidence.

(Photostatic copy of blue card labeled "Individual Lease Agreement" admitted and received in evidence and marked Plaintiff's Exhibit 7.)

Q. (By Mr. Ruiz): Now, I notice that you have now three of the remaining cards in your hand. Can you refer to the card that followed the card of April 24, 1944, please?

A. That was surrendered on May the 21st, '45. Was it May 21st, '45? That is correct.

Q. Is it your testimony that Plaintiff's Exhibit 7 was surrendered on May 21st, 1945?

A. Yes.

Q. By the person who signed as W. H. Towner?

A. That is correct.

(Testimony of Daniel J. Byrne.)

Q. Was there another safe deposit box then opened?

A. Yes, a larger box, 2173, for \$6.00.

Q. A larger box was then opened by the person who signed himself as W. H. Towner?

A. That is correct.

Q. And when was that taken?

A. That was taken the 21st of May, 1945. On the 22nd of [101] May it was surrendered because it wasn't large enough. He took a larger box. \$8.00.

Mr. Trowbridge: What institution are you referring to? A. Our own card.

Q. What bank?

A. American Trust, inasmuch as the American Trust used that green card for a year or so before we changed, we used their card.

Q. (By Mr. Ruiz): The card to which reference was just made was the card issued by your employer? A. Yes.

Q. And that was opened on what date?

A. I think it was May 21st, wasn't it?

Q. And you say that was surrendered——

A. On the 22nd and taken this box.

Q. Of May, 1945?

A. That is correct; he took an \$8.00 box.

Q. Mother's maiden name says "Frances Russell" on this card. A. Yes.

Q. I would like to offer that as Plaintiff's next exhibit in order and in lieu, pursuant to the stipulation, substitute a photostatic copy.

Mr. Trowbridge: May I see it? I would like to

(Testimony of Daniel J. Byrne.)

get the sequence of this right. This box was surrendered on May 22, 1945. Is there a card that shows when this one was opened in [102] the American Trust?

A. Yes, right there on the 21st, on the reverse side. The renting is on one side and the surrender, cancellation, is on the other side, reverse side. That is his handwriting there.

Mr. Trowbridge: Thank you very much.

Q. (By Mr. Ruiz): I notice you said that is his handwriting. Where is the handwriting of the applicant on this card?

A. I am pretty sure he put the date down and the address, his name, and "San Francisco"—

The Court: Raise your voice so the reporter can hear you.

Q. (By Mr. Ruiz): In other words, the renter signs in his own handwriting, is that correct? He did on that card?

A. Yes.

Q. He did on this card?

A. Most of the time they do unless the address has been changed.

Mr. Ruiz: I would like to offer as Plaintiff's next exhibit in order the last document referred to by the witness.

Mr. Monell: Is this the one that was cancelled?

Mr. Ruiz: Yes.

Mr. Monell: 2173?

Mr. Ruiz: Dated May 22, 1945.

Mr. Monell: That was Box A-2173?

Mr. Ruiz: Safe No. A-2173.

(Testimony of Daniel J. Byrne.)

The Clerk: Plaintiff's Exhibit 8 admitted and filed in [103] evidence.

(Card re Safe No. A-2173 admitted and received in evidence and marked Plaintiff's Exhibit 8.)

Q. (By Mr. Ruiz): Calling your attention to Plaintiff's Exhibit 6, being the original contract dated January 9, 1943, on the reverse side thereof it gives an address, 220 Golden Gate Avenue, and it says "Notify Lois Umsen." Can you tell me, if you know, who put that name of the sister down there, Umsen?

A. Well, I am pretty sure that is Mr. Jones' handwriting.

Q. Mrs. Jones?

A. Mr. Jones. Both he and she were then Mr. Jones.

Q. Who is Mr. Jones?

A. He was the man that ran that vault; it used to belong to the Brotherhood Bank.

Q. Are you acquainted with Mr. Jones' signature?

Mr. Trowbridge: Just a moment, please.

A. Yes, that's right.

Mr. Trowbridge: Just a moment. Will it be understood we have the same objection to this testimony that we made to the other testimony?

The Court: A running objection.

Mr. Trowbridge: It is a running objection, your Honor, subject to a motion to strike?

(Testimony of Daniel J. Byrne.)

The Court: Right.

Q. (By Mr. Ruiz): Are you acquainted with Mr. Jones' signature? [104] A. Yes.

Q. And his handwriting?

A. I wouldn't say too much of his handwriting.

Q. You have seen his signature before?

A. Yes.

Q. And that is his signature? A. Yes.

Mr. Ruiz: Mr. Clerk, I should have given you the photostatic copy in lieu of the original and I will do that at the present time.

Q. (By Mr. Ruiz): I notice that you have two more cards in your possession. Which is the next card in order as to date? A. This one here.

Q. The card you are now handing me?

A. That's right.

Q. And that refers to safety deposit box No. A-1917? A. That's right.

Q. And the renter was a W. H. Towner?

A. That is correct.

Q. Insofar as his signature is concerned?

A. That is correct, yes, sir.

Mr. Trowbridge: What bank?

Mr. Ruiz: Savings Union office, San Francisco, California; is that correct? [105]

A. Yes, that is correct.

Q. Is that the bank? A. Yes.

Mr. Trowbridge: That is part of the American Trust Company? A. American Trust.

Q. (By Mr. Ruiz): And it says "Introduced

(Testimony of Daniel J. Byrne.)

by A-1861 and A-2173." What does that mean, if you know?

A. Well, we carry those on as references.

Q. And what do those references indicate, if anything?

A. They at one previous time have had that box.

Q. I see. A. That box renter.

Q. And can you tell when this was surrendered, this box?

A. Yes, that was surrendered on February 10, 1947.

Mr. Ruiz: I would like to offer as Plaintiff's next exhibit in order the document just referred to.

Mr. Trowbridge: Let me see it.

Mr. Ruiz: And in lieu of the original substitute by stipulation of counsel a photostatic copy thereof.

(Photostatic copy of card re Safe No. A-1917 admitted and received in evidence and marked Plaintiff's Exhibit 9.)

Q. (By Mr. Ruiz): Did you personally ever see Mr. Towner?

A. Yes, quite often. I waited on him quite a bit.

Q. You knew what he looked like? [106]

A. Yes, sir.

Q. I think you have one more card left, sir.

A. Yes, sir.

Q. I notice that this card bears a date, Savings Union office, February 10, 1947, and it says "Introduced by A-161, A-2173 and A-1917." And likewise is signed by the renter under the signature

(Testimony of Daniel J. Byrne.)

“W. H. Towner.” A. That is correct.

Q. And up here on top it says “W. H. Towner, deceased.” Can you tell me who put the word “deceased” on there? A. I did.

Q. You did? Who told you that he had died, if you remember?

A. If I am not mistaken, it was a party that said his name was Sidebotham.

Q. Somebody by the name of Sidebotham?

A. A young man who said his name was Sidebotham, looking out for his father’s possessions. He had quite a few keys. I couldn’t find that name in my place. I couldn’t find any of the keys that he had present. We had quite a little talk there about what different banks he may go to. Then all of a sudden he pulled out some photographs. As soon as I saw the photograph I showed it to the lady and I said, “That is so-and-so, isn’t it?” I couldn’t call the name at the time that she did and I said, “That’s it.” Then he did pull out a key out of his pocket that belonged to that box and the identification was made. [107]

Q. Did he say that was his father’s photograph?

A. Yes.

Q. He said the photograph was his father—that is, Mr. Sidebotham—did he? A. Yes.

Q. And this photograph was the same man that had been signing under the name of Towner?

A. That is correct.

Q. And the one that you had always been seeing there? A. Yes.

(Testimony of Daniel J. Byrne.)

Q. You have been there how many years?

A. I am on my forty-third.

Q. And when that was located Mr. Katz came over here—you see that gentleman over there—and he took over everything that was in it, didn't he?

A. That is correct. It was examined by the Inheritance Tax man, Mr. Kane, who is with the state, a very fine fellow.

Q. And that is the signature of Mr. Katz?

A. That is, yes. I witnessed that.

Mr. Ruiz: I would like to offer this document as the next exhibit in order.

Mr. Monell: Is that the same box you referred to, A-1917, or the new——

Mr. Ruiz: 2917.

The Court: It will be admitted and [108] marked.

The Witness: That is the new one.

Mr. Ruiz: Apparently he kept getting larger boxes.

The Witness: That is the new one. He went to that one on account of a lost key. It was the same size as the last one—they are two of the same size, but he transferred from one to the other on account of the lost key.

Q. Do you remember he had more than \$63,000 in cash in that box?

A. I heard it, but I didn't count it. I heard it.

Mr. Monell: I ask that the answer go out as being hearsay.

The Court: It may go out. What he heard may

(Testimony of Daniel J. Byrne.)

go out. I take it Katz counted the money; I don't know.

The Witness: A couple of times.

Mr. Ruiz: I think that is why he has this big briefcase here.

The next exhibit in order is being offered by the plaintiff at this time.

(Photostatic copy of card re Safe No. A-2917 received in evidence and marked Plaintiff's Exhibit 10.)

Mr. Ruiz: You may cross-examine.

Cross-Examination

By Mr. Monell:

Q. Mr. Byrne, you have no personal knowledge of any of the transactions of your predecessors, that is, the Savings Bank and the Brotherhood Bank, so far as this box is concerned, isn't that true? [109]

A. Just as we took these records over.

Q. Do the records which you have show how many times the decedent had access to this box?

A. At our place?

Q. No, so far as the predecessors are concerned.

A. No, we had a record, a couple of boxes of those access tickets, but we didn't keep them.

Q. Do your present records show, since the American Trust Company took over the prior institution, how many times the decedent went to that box? A. Yes, sir.

Q. And have you those records with you?

(Testimony of Daniel J. Byrne.)

A. No, I haven't.

Q. Do you know by any chance of your own knowledge how many times he had access to that box?

A. Oh, just guessing, I would say fifty or sixty times.

Q. Over what period of time?

A. The time that he has been with us since '44 until the time he passed away. I had a list—I made a list of them.

Q. To whom did you furnish that list?

A. It was given to several different people. Several different times I made that list.

Q. And you wouldn't know, nor would that list disclose, whether he put anything in the box at those times or whether he withdraw from the box at those times? [110]

A. No, it would not.

Q. As to any contents of the box at the time it was opened after Mr. Sidebotham's death, you wouldn't know how long those particular contents had been there, would you?

A. No, I have no idea.

Q. You mentioned that this last box was opened because he lost the key to box 1917, I believe; is that correct?

A. Yes.

Q. What is there on that card that indicates that to you?

A. That the key was lost?

Q. Yes.

A. At that time we put this little sticker on, "Key lost," and the date it was reported.

Q. Oh, I see. Does that sticker show on the label?

A. Yes, it is on the photostatic copy.

(Testimony of Daniel J. Byrne.)

Q. I overlooked that.

A. And a clip is also put on the box.

Q. When a key is lost, then what happens to the old box?

A. It is surrendered by him, he takes a new box, and that lock is changed before it is rerented again.

Q. Is that a considerable operation that takes some time?

A. Oh, yes, yes; the safe company does it for us. We don't do our own changing; that is done by the safe company. We don't know what the change is.

Q. The only reason you don't change the particular lock and [111] give him a new key is on account of——

A. Sometimes they have found the other key and come down with it and couldn't get in and we have a lot of trouble.

Mr. Monell: I think that is all, Mr. Byrne. Mr. Trowbridge may have some questions.

Q. I wonder, Mr. Byrne, could you supply us with that list of the dates? Do you have that at your bank? A. Yes, I have.

Q. I don't like to ask you to come back; we would like to have it.

A. I will mail it to you if you wish. It might take a couple of hours to make it.

Q. You don't have any extra supply of copies?

A. I have the original, and from the original I make copies.

(Testimony of Daniel J. Byrne.)

Q. Is it as long as that? You say it will take two hours?

A. It is a batch. I have got each contract and each access for each box.

Q. I think you are slandering your secretaries down there to say that it would take two hours to copy a list of a couple of pages.

Mr. Monell: Will we be proceeding a couple of days? If he mailed it to us here wouldn't it get here before the case concluded?

Mr. Ruiz: I don't know. I might ask him a general question at this time. [112]

Q. You made up these lists before?

A. Yes.

Q. Taking the arbitrary date, November, 1946, were more visits made before or after?

A. Oh, I wouldn't be able to remember that; I would have to get that statement.

Mr. Monell: Possibly we could arrange, if you would have that done.

The Court: Maybe counsel has got a copy. Have you got a copy?

Mr. Ruiz: No, your Honor. I have never been furnished with that list.

Mr. Monell: Mr. Fontes doesn't have a copy either, your Honor. I was going to suggest that if you will have that typed on the bank stationery we could pick it up at the close of the session this afternoon.

The Witness: I will have it ready by half past

(Testimony of Daniel J. Byrne.)

four this afternoon. I could bring it to your office if you want.

Mr. Monell: If you could do that.

The Witness: Where is your office?

Mr. Ruiz: Counsel, will you request him to make a duplicate copy?

Mr. Monell: And will you make a duplicate copy so Mr. Ruiz could have one and send it to 1019 Mills Building?

The Witness: Yes. [113]

Mr. Monell: Thank you, very much.

The Court: Is that all from this witness?

Mr. Ruiz: That is all from this witness.

The Court: You might relax now.

Mr. Monell: Thank you.

Mr. Ruiz: Thank you, sir. [113-A]

FRANK J. FONTES

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name, your occupation and your address.

A. Frank Fontes. I am an attorney. The address is 360 Phelan Building. I also have an office in the City Hall. I am attorney for the Public Administrator.

The Court: Who is the Public Administrator?

A. W. A. Robison.

Q. Where is he?

A. He is up at the office now, I believe, unless he is out on safe deposits.

(Testimony of Frank J. Fontes.)

Q. Does he depend on you to take care of this?

A. Well, I handled this long before he came into the office. This came into the office in about '51 or '52 and he hasn't been there that long.

Q. What is his name? A. W. A. Robison.

The Court: I'm afraid I'm getting old. I used to know everybody at the City Hall.

A. He was connected with Hetch Hetchy for a while and then the San Francisco Water Department.

The Court: Well, he knows me, then. They all know me.

Direct Examination

By Mr. Ruiz:

Q. You have the estate of Robert [114] Sidebotham under your supervision and control?

A. Yes, sir.

Q. In your capacity as Public Administrator?

A. Well, I am attorney for the Public Administrator. It has been under the control of the Public Administrator, first with Phil C. Katz, and then I was in there for a short time while they were holding examinations, and then Mr. Robison is now the Public Administrator and he has the estate under his control.

Q. He has delegated you authority particularly to take care of this estate?

A. Yes; I have been taking care of it from its inception.

Q. For and on behalf of the Public Administrator? A. Correct.

(Testimony of Frank J. Fontes.)

Q. Now, one of the authorities of your office is to collect and take charge of decedents' estates?

A. Correct; yes, sir.

Q. And you then file an inventory pursuant to your duties? A. Yes.

Q. Is the County Clerk here with the file?

A. No, Mr. Powers was here yesterday; I don't see him here today.

Mr. Ruiz: I asked him to come down here this morning. Now we need the file.

The Court: He was here all day yesterday. Why didn't [115] you call him?

Mr. Ruiz: I told him to come here this morning, sir. I will have to telephone him.

The Court: We will take a recess.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Ruiz): Now, pursuant to your authority to collect and take charge of the decedent's estate, you did in fact file an inventory?

A. Yes.

Mr. Ruiz: I have showed a photostatic copy of an inventory that I gave to counsel, and I would like to show the witness a photostatic copy of an inventory and ask you if that is the inventory which appears in the original files, sir.

A. Yes. I can't recall item by item, but I have looked at it and this appears to me to be a copy. I see these appraisers there and I recognize——

Q. The signature?

(Testimony of Frank J. Fontes.)

A. Yes. That appears to me to be an inventory—the inventory we filed, yes.

Q. And what was the estate appraised at insofar as the total is concerned?

A. Well, you mean this—in this jurisdiction, this figure shown here, \$113,219.74. [116]

Q. Do I understand that proceedings were had in other jurisdictions as well? A. Oh, yes.

Q. Does the local file indicate the appraisal as to those assets?

A. Well, I have the copy of the federal return, your Honor, which shows sort of a collective list of assets purporting to be here and in Idaho and in Colorado.

Q. Fine. Now, with respect to the particular item that I am still making reference to and which is in your hand—— A. Yes.

Q. May I have it, please? A. Yes.

Q. I notice that in the heading it says, “In the matter of the Estate of Robert Russell Sidebotham,” and that there are other names there: “Also known as Robert R. Sidebotham, Robert Sidebotham, R. R. Sidebotham, Russell Sidebotham, R. Russell Sidebotham, Edward W. Sidebotham, George W. Anderson, George William Brown, George W. Fenton, E. W. Hutton, Edward Hutton, Edward W. Hutton, W. H. Jackson, R. R. Smith, Russell R. Smith, George William Smith, Russell Robert Smith, George R. Stone, George W. Thompson, W. H. Towner, and William Towner,

(Testimony of Frank J. Fontes.)

Deceased." Can you state why those names appear on the caption?

A. It was reported to us that the decedent was also known [117] under other names. Names were furnished to us by other persons; I think possibly from one of his sons; an attorney representing Mrs. Ramsey, and also from one of the administrators over in Idaho or Colorado, I am not sure.

Q. And did you in fact accumulate assets in that inventory and appraisal under those various names?

A. Yes, some of them. I can't positively take each name and say, for example, Towner is one of the names he used on that safe deposit box.

Q. He had other bank accounts, didn't he?

A. Yes.

Q. And your records indicate where you received funds from such other banking institutions?

A. Yes, they would. The ledgers would show that. I see them listed here on the inventory giving the names of the banks. I recognize some of these accounts.

Q. Will you refer to the accounts and state what you recognize about the accounts concerning the inventory?

A. First, that currency was from a safe deposit box in the American Trust Company.

Q. And how much was the currency?

A. \$64,770.

Q. Yes; continue.

A. Some of this apparently is part of the contents of the safe deposit box of the Eureka Federal.

(Testimony of Frank J. Fontes.)

We took charge of [118] that one down here. Of course, obviously, we took charge of all of these various monies that are shown in this inventory, that's for sure.

Q. Under what name did he have an account in the Eureka Federal?

A. I can't tell you from memory. I would have to take each bank and refer right to our records, or in some instances the ledger don't show the name, just shows what bank we got it from, and possibly the number of it, and also whether it is a savings or commercial account.

Q. Where is that ledger that you make reference to?

A. That is in our office in the City Hall.

Q. And that ledger will indicate from what institution it came?

A. Well, I can't from memory say. Generally speaking, there is some notation on the ledger as to where that item came from. But I might have to, in turn, refer to the ledger—to a journal for the item.

Q. Will you bring the ledger and the journal this afternoon, sir? A. All right.

Mr. Ruiz: At this time I would like, in lieu of the inventory and appraisal which is on file, offer as Plaintiff's exhibit next in order, a photographic copy thereof, stipulated to by the adverse [119] counsel.

Mr. Monell: Is that certified by us?

(Testimony of Frank J. Fontes.)

The Witness: There's the file stamp on the back of that.

Mr. Ruiz: Yes, it is certified by the County Clerk of the City and County of San Francisco and it has the seal of the Clerk's office.

Mr. Monell: We will stipulate to the introduction of the photostatic copy.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 11 admitted and filed.

(Whereupon, copy of inventory and appraisal was received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. (By Mr. Ruiz): Has it ever been determined that the ownership of the properties inventoried by your office belonged to any person other than the decedent?

A. It has not finally been determined; there is an action pending to determine, a claim filed.

Q. The question is, has it ever been so determined? A. The answer is no.

Q. Mr. Fontes, has your office ever marshalled any evidence pursuant to its duties which proves where the decedent procured the funds and the monies which go to make up his estate?

A. No, no, we don't usually establish proof of ownership. If we find monies on deposit in the name of a deceased [120] person and we are handling the estate, we take charge of that account.

(Testimony of Frank J. Fontes.)

If there are other claimants asserting any title to it, then they either bring suit against us or file some sort of a claim.

Q. Have you ever been able to determine when the funds and the monies which go to make up the decedent's estate first came into existence?

A. No, no, that is part of the matter that is being tried in another action now as to the source of his present or the monies that he owned at death. And I refer to the decedent.

Q. Have you any evidence to prove that monies and funds of the decedent inventoried by you were not earned by decedent before the month of November, 1946?

A. Your question is, have I any proof as to whether they were earned prior to a certain date?

Q. Yes.

A. I have no proof as to when they were earned.

Q. Now, isn't it a fact that the decedent left no books of account of any kind?

A. No, no books of decedent—books of account of the decedent ever came into our possession.

Q. Now, you mentioned something about the Internal Revenue Department a little while ago.

A. Yes.

Q. Have you inquired whether the United States Internal [121] Revenue Department has accumulated any evidence concerning the period of time as to when the decedent earned or received the monies which you inventoried?

A. They filed a lien against the estate for over

(Testimony of Frank J. Fontes.)

\$149,000 in which they list income starting with 1946 and running through 1951, and then they take the tax on what they call a net worth basis and they have added penalties and they have added interest on top of that, and the total of all those figures for all that period is over \$149,000.

Q. Is there in the file, the original file, a copy of that lien? A. Yes.

Q. Which indicates what you have just stated?

A. Right.

Mr. Ruiz: Mr. Powers, do you have the files?

Mr. Powers: Yes.

Mr. Ruiz: May it be stipulated, counsel, that these files are the official files of the estate of Robert Sidebotham, Deceased?

Mr. Trowbridge: Correct.

Q. I am handing you the official file, sir, and with respect to the last question will you refer to the Internal Revenue——

A. Yes, this first paper that I came to, your Honor, marked "Claim of the United States for taxes" appears to [122] be the one, yes.

Q. Now, let me make reference to that document to which reference you have made. That was filed February 27, 1953, was it not? A. Yes, sir.

Q. Now, is there located in that file a comparative statement of certain assets concerning income and tax liability that was ever called to your attention?

Mr. Trowbridge: What document are you referring to, counsel?

(Testimony of Frank J. Fontes.)

Mr. Ruiz: I will have to go a little bit further along this and then we will get to that.

Q. Now, on February 11, 1953, in that file, will you please observe what you filed on that date? Is it not a fact that on February 11, 1953, you petitioned for instructions to incur expenditures for the specific purpose of investigating when Mr. Sidebotham earned or received monies?

A. We did file petitions on more than one occasion, I believe.

Q. Now, will you look in the file for the date February 11, 1953? A. February 11, '53?

Q. Yes, sir.

A. I have one February 13, 1953, for instructions.

Q. To employ William Dolge & Company, certified public [123] accountants, to make an investigation?

A. I don't know; I came to a notice here. We did file a petition to employ William Dolge—I can answer your question without looking at that date; we did file such a petition and secured such an order.

Q. The reason I am making reference to the petition is because you make a statement there, and I want to read it into evidence, February 11th, 1953.

A. The dates don't seem to be in order. I have come to the 13th.

Q. That is one of them. Let me see if I can find it.

(Testimony of Frank J. Fontes.)

The Witness: This begins in '53.

Mr. Ruiz: Here we are. I have found it.

The Court: I was going to suggest maybe the clerk is more familiar with these documents than you are. He might possibly help you.

Mr. Ruiz: I think we have found it here, February 11, 1953.

A. Yes.

The Court: The lost is found.

Q. (By Mr. Ruiz): Is that the petition where you asked the Court for instructions to employ William Dolge & Company, certified public accountants, to make an investigation?

A. Let's see; the name of the person here particularly——

Mr. Ruiz: Let's see if there is some other document— [124] here it is, February 11th. That's it.

Q. Isn't it a fact that on February 11, 1953, you filed a document wherein you say the following—that is your signature, isn't it?

A. Yes, it is; yes.

Q. And it contains the signature of Mr. Delger Trowbridge as well? A. Yes.

Q. "The Internal Revenue Bureau refuses to disclose any of the facts in its possession as to how and on what evidence it based its jeopardy assessment. Said decedent left no books of account of any kind but did leave bank accounts, cash and other assets in various banks of the state of California and elsewhere and left a mass of miscellaneous documents in Idaho, which material has been de-

(Testimony of Frank J. Fontes.)

livered to Delger Trowbridge, your petitioner's special counsel." A. Yes.

Q. Is it not a fact that the Internal Revenue Department has refused to give you information concerning the time—— A. Is what?

Q. Is it not a fact that the Internal Revenue Department has refused to give you information as to the time when the decedent acquired these monies?

A. Well, only what I assumed from the tax lien, and I [125] assume from the tax lien that that levy of that lien by the calendar years of '46 to '51 means what it says: That during those particular years that is what he made.

Mr. Monell: Just a moment. If the Court please, for the purpose of the record, I would like the answer of the witness insofar as it is his assumption of that being the amount that the decedent made go out as being the conclusion of the witness.

The Court: I think maybe we can agree on that.

Mr. Ruiz: Very well. It should go out anyway.

Q. Now, on the question of the time when the monies which went to make up the assets of the decedent were accumulated, did William Dolge & Company, certified public accountants, render a report to you? A. Yes.

Q. Do you have that report with you?

A. I had a copy.

Q. May I see the copy?

A. I think I delivered that to Mr. Trowbridge.

Mr. Trowbridge: Yes, I have it here, and it is

(Testimony of Frank J. Fontes.)

addressed to me. I think it is a privileged communication that counsel is not entitled to.

Mr. Ruiz: Aren't you attorney for the Administrator?

Mr. Trowbridge: I certainly am; I am representing him in this case. [126]

Mr. Ruiz: And didn't the estate pay money for that?

Mr. Trowbridge: I assume it did.

Mr. Ruiz: And was this not filed pursuant to the duties in an estate for probate filed in California by the Public Administrator?

Q. Now, isn't it a fact that when this firm of public accountants began to investigate pursuant to your petition that you asked that he investigate only the income of the decedent between the years 1946 to the time that he died?

A. I have had—I am not aware of that specific instruction. It could have been, because I think that that evidence was required largely on account of this very high levy of \$149,000 which would exhaust the estate.

Mr. Ruiz: Your Honor, I am looking for a paragraph where he was asked to do that. I will find that later so as not to take too much time.

Q. William Dolge & Company was in fact paid the sum of \$1,500, you said, to find out if the decedent's assets were accumulated after 1946; is that not true?

A. They were paid. I don't recall the amount. If it is set forth in the account, of course, that would

(Testimony of Frank J. Fontes.)

be correct, but I don't carry in mind the amount they were paid; but they were paid, that is true.

Q. And these licensed accountants wrote a letter to your special counsel, Mr. Delger Trowbridge, about their investigation? [127]

A. I wouldn't know what they wrote to Mr. Trowbridge personally; I know generally what was going on, but I can't be specific about that.

Q. Well, didn't you get a copy of the letter?

A. I can't recall now. There was so much correspondence went on in reference to this estate that I can't carry in mind what copies I received.

Q. Will you look for such a copy during the noon recess?

A. A copy of the letter written by Dolge to Mr. Trowbridge?

Q. That was sent to you.

A. A copy sent by them to me?

Q. Yes.

A. I will look and see. Do you know about what year you are referring to?

Q. Pursuant to the petition filed for special instructions to which reference I have been making.

A. All right.

Q. On April 2nd I believe you made reference to the fact that your office filed a report made up by the United States Treasury Department from which it appears that the decedent did not file income tax returns for the years 1946, '47, '48, '49 and '50.

(Testimony of Frank J. Fontes.)

A. They filed a tax lien, yes. Is that what you call a report? Yes, it is. [128]

Q. That the decedent didn't file any returns?

A. That is what their tax lien is based on, yes, because——

Q. Because the decedent did not file an income tax return? A. That is what the tax lien says.

Q. As administrator of the estate, have you any evidence that the decedent did file a report wherein he reported income received or earned by him for the years 1946 to the date up to and including the year 1950?

A. Not for '46 or anything after that. I think for '45 he made a report of some earnings at a shipyard or something like that.

Q. Let me see; the decedent died in 1951, didn't he? A. Yes.

Q. And the year 1951 was his last taxable year on earth?

A. Yes, he died in December of that year shortly before Christmas.

Q. He did make a report that he received in 1950, or was it '51, the sum of \$10,000?

A. If he did, I don't know about it.

Q. I believe that there is in that file—I am going to call your attention to this schedule again because it was taken from the file at one time, wherein there is set forth the following information: That the decedent, according to the files, made no income or reported no income——

Mr. Trowbridge: Just a moment, please. You

(Testimony of Frank J. Fontes.)

are referring [129] to a piece of paper that we haven't seen. May we see that paper, please?

Mr. Ruiz: No, this isn't the paper. I am referring to his independent recollection, if he knows where in that file something else I will have to get out of it.

A. I do not recognize the document you held in your hand at all. I mean to say entitled a comparative statement of income over this period of years. I am not familiar with it.

Mr. Ruiz: Here is one of the letters.

The Court: Do you have that letter?

Mr. Trowbridge: What do you mean?

Mr. Ruiz: Concerning his net income. I will ask the witness:

Q. Now, I am showing you another document here where it refers to the decedent's net income with respect to reports filed by him before the Bureau of Internal Revenue, and in 1946 it says, "None filed."

Mr. Trowbridge: Just a moment. That document is not in evidence.

Mr. Ruiz: I am going to have him identify it, if I can. Up to 1950—and then in 1951——

Mr. Trowbridge: Just a moment, please, your Honor. He is reading things into the record from a paper that has not been identified or authenticated in any way.

The Court: He is trying to identify it. [130]

Mr. Trowbridge: I know, but he shouldn't be reading the whole document in evidence. That is my

(Testimony of Frank J. Fontes.)

objection. Mr. Fontes can look at it and say what he knows about it.

The Witness: I don't recognize this document at all. I don't know whether the tax lien has got this same stuff in it or not. The penalties and the tax seem the same to me because they add up the same, but that at the top here, 1946 up to and including 1950, they say, "None filed." And '51, according to this paper, they have \$10,015.06. Let me see the tax lien.

Mr. Ruiz: Now, will you look through the record, and particularly where the government has filed matters.

The Court: Counsel, may I inquire, where did you get this document?

Mr. Ruiz: I think I got it out of the file.

The Court: What file?

Mr. Ruiz: One of these two files that are here, your Honor.

The Court: Proceed.

The Witness: It may be there, counsel, but I am just not familiar with it. I don't recall of seeing that data that is along the top there.

Mr. Ruiz: May I mark this for identification at this time?

The Court: It may be marked for [131] identification.

The Clerk: Plaintiff's Exhibit 12 marked for identification.

(Testimony of Frank J. Fontes.)

(Whereupon, document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Ruiz): It may appear in the document—I am not too sure, filed February 27, 1953. Do you want to look at the other? A. Yes.

Q. February 27, 1953? A. All right.

Mr. Ruiz: No, that is something else. I'm sorry.

The Court: Is it possible this might be a forgery?

A. I have a suspicion that was a return which might have been filed by us, wasn't it, after he was dead? He didn't file a return the same year he got killed in.

Mr. Ruiz: I will have to devote my noon hour to going through that file, your Honor, I can see that. I am trying to proceed as far as I can without wasting the Court's time any more.

Q. On May 13, 1953, your office filed a petition for instructions wherein the firm of Krout & Schneider had been employed to investigate the location of assets of the decedent under a series of different names and aliases, and in that petition you felt that Krout & Schneider should be paid the sum of \$1,065.70, did you not? [132] A. Yes.

Q. May 13, 1953?

A. Yes, we filed a petition to employ Krout & Schneider.

Q. Now, three months later, on August 13, 1953, you likewise filed another petition wherein you

(Testimony of Frank J. Fontes.)

thought that Krout & Schneider were doing so well that you felt that they should get \$500 more; is that not true?

A. If it is set forth in the petition and you are asking me if that is the record, that is correct.

Q. Well, does the record not contain such a petition which was filed?

A. I can't remember the contents of each petition, but generally speaking, we employed Krout & Schneider, and I have a recollection they did come back and ask for more money after they performed one duty or got one report in, they suggested for more money they would do something else, but I can't remember the details of it.

Q. Now, a confidential report was rendered by this firm; is that not true?

A. I believe you are correct.

Q. And this report covers the activities of the decedent before the year 1947 as well, did it not?

A. I don't—I would have to refresh my memory. I can't say what the report of these investigators contained without referring to the report itself. I could probably locate [133] that report maybe during the noon hour, unless we took time now, because the file is very voluminous and it is very difficult to familiarize myself with an entire suitcase here full of papers.

Q. That is true. Will you try to locate that confidential report, sir? A. Yes, I will.

The Court: So that your lunch is not interfered with, I am going to take an adjournment now and

(Testimony of Frank J. Fontes.)

if all of these documents are available, all of you can get together and find out where they are and what they are.

Mr. Ruiz: Thank you, sir.

The Court: If that is agreeable to everyone, we will take an adjournment until 2:00 o'clock.

(Whereupon, an adjournment was taken to 2:00 p.m. the same day.) [134]

Afternoon Session, October 25, 1955

FRANK J. FONTES

resumed the stand.

Direct Examination
(Continued)

By Mr. Ruiz:

Q. Just after the noon recess when you got down from the witness stand, you handed to Mr. Trowbridge an envelope that contained a report, did you not?

A. Yes, I gave Mr. Trowbridge the report in the Dolge matter, and I believe he had the one in the Krout & Schneider.

Q. And you had that report in your possession when I was questioning you this morning?

A. Krout & Schneider, no.

Q. The Dolge report?

A. Yes. I gave that to him today or yesterday, I have forgotten; I gave it to him, though.

(Testimony of Frank J. Fontes.)

Q. At noon? A. I am not sure about that.

Q. Do you recall having a conversation with me during the noon hour? A. Yes.

Q. And do you recall telling me that you were just giving it to Mr. Trowbridge?

A. I had given him the Dolge report. At any rate, he had gotten it. He had both reports.

Q. Very well. Calling your attention to the file again, [135] I believe we were talking about the Bureau of Internal Revenue. A. Yes.

Q. And there appears a registered letter which is made an exhibit therein of a petition for instructions filed April 21, 1953. A. Yes.

Q. Is that not so? A. Yes, sir.

Q. There is reference made to an exhibit called Exhibit A therein? A. Yes.

Q. And calling your attention to Plaintiff's Exhibit 12 for identification, I will ask you if you have compared that with Exhibit A or the portion thereof.

A. Yes, that is the same thing. First it has got the income stated——

Mr. Trowbridge: May I see it a moment?

A. Yes. This and that are the same. That is the method upon which they arrived at their income for these various years. Down here is the tax and penalties.

Mr. Ruiz: Very well. At this time I would like to offer Plaintiff's Exhibit 12 into evidence.

The Court: Let it be admitted and marked.

Mr. Trowbridge: We will object to that, your

(Testimony of Frank J. Fontes.)

Honor, as [136] being hearsay. The proper foundation isn't laid for it. It is obvious it is a copy of a report of a government agent, and it must be based on hearsay. It is obvious on the face of it.

The Court: Indicate for the purpose of the record the purpose of the offer, counsel.

Mr. Ruiz: Yes. The law is this with respect to hearsay and the purpose for which it is offered: that although a party litigant as a rule cannot be concluded or his rights affected by the acts or statements of strangers, but yet insofar as such acts or statements furnish circumstantial evidence of relevant facts or have any legal operation material to the subject of inquiry evidence thereof is admissible. Now, the courts will take judicial notice of the laws; the courts will take judicial notice of the regulations promulgated pursuant to the federal requirement that residents shall, if they receive income, make a report. That is their duty and their legal obligation.

The conduct of the decedent is likewise an admission against interest. In any admission against interest in this case to the claim asserted by the plaintiff, it becomes germane.

Now, with respect to this particular Internal Revenue report, it is admissible under the theory of law I have just stated, because we are going to have to indulge in presumptions [137] later on when we finally terminate this case and find out that there is no evidence whence, where or how he got the money. And all evidence that can come in by way

(Testimony of Frank J. Fontes.)

of circumstantial evidence is going to be important for this Court because this Court is going to have to indulge in the presumption that the decedent obeyed the law; that the decedent didn't commit a crime with respect to his income; that the decedent didn't commit fraud with respect to his income; and this becomes at once material because of the fact that it indicates that for the years '46, '47, '48 and '49, he did not make any income tax returns, which means that it allows us to indulge in the presumption he obeyed the law; that he didn't make any money. In '51 there was a return made by the administrator for \$10,000 which means that, excepting the sum of \$10,000, the money that he acquired must have been acquired prior to 1946. That is the purpose for which it is offered.

Mr. Trowbridge: Your Honor, counsel has done a lot of testifying in his argument here. It still remains the fact that this exhibit is attached to the notice of lien in which the government is demanding taxes of \$149,000, and that in turn was an exhibit to a petition for instructions by the public administrator, the administrator of this estate, to get authority to contest this claim. That appears right in the petition for instructions. In other words, the Public [138] Administrator is not admitting that those allegations in this report are correct. They are obviously hearsay. They are simply a memorandum attached to a notice of a lien demanding taxes from the administrator of this estate, and nothing in the world to back them up. It is obvious

(Testimony of Frank J. Fontes.)

on their face that they are hearsay. Proper circumstantial evidence is always admissible, but it can't be based on hearsay. You can't build up your case with circumstantial evidence on hearsay, and that's all this is, is hearsay. Therefore we object to it on that ground, and on the ground the proper foundation has not been laid and it is immaterial, irrelevant and incompetent.

Mr. Monell: We join in the objection.

Mr. Ruiz: These are liens that have been filed by the United States Internal Revenue Department. And again I refer to *Liberty Bank v. Ernst*, 93 Cal. App. 560, and *Liberty Bank v. Nonnemann*, 96 Cal. App. 476, to the effect that these statements are relevant and admissible to the subject of this inquiry and that evidence therefore is properly received by this Court.

The Court: I am going to allow the testimony to go in subject to a motion to strike and overrule your objection, and we will have an opportunity at that time to examine the authorities that he cites as to the admissibility.

Mr. Trowbridge: Thank you. [139]

The Court: You haven't waived any of your legal rights.

Mr. Ruiz: Again I will call your attention, sir, to an item contained in the same file under your supervision which makes reference to certain monies which were located in various names and which have now become a part of the estate. I call specifically your attention to a comparative statement

(Testimony of Frank J. Fontes.)

of certain assets and refer your attention to the items therein mentioned, being items 2 to 9, and more specifically to one item that says: "Date account established, initial deposit," and then various years beginning 1945, '46, '47, '48, '49, '50 and '51.

Mr. Trowbridge: What is this attached to? That is the petition here?

Mr. Ruiz: That is some of the privileged information.

Mr. Trowbridge: All right; pardon me. We will make the same objection to this line of testimony, your Honor; that it is obviously based on hearsay and incompetent, irrelevant and immaterial and no proper foundation laid. This again is merely a petition for instructions and anyone can see that it is hearsay. It is not in the form of an affidavit as to the particular facts that show in that exhibit but was merely put in there for information by the Administrator so that he can tell the Court what claims he has to meet and what money he needs to investigate these claims. It is obviously hearsay, and we will again make that objection. [140]

Q. (By Mr. Ruiz): Now let us start with the depository Eureka Federal Savings and Loan Association.

Mr. Monell: Just a minute.

The Court: Let me try to follow you. What are you attempting to do?

Mr. Ruiz: There are nine items of accounts here, your Honor, which indicate the date each account was established in accordance with the records of

(Testimony of Frank J. Fontes.)

the public administrator. The public administrator pursuant to his duty has reduced certain assets and accounts to his possession. His possession is the possession of the decedent. As a public officer in this public file, the administrator perforce must predicate his conclusions herein on any minute data available to him.

One way to examine a witness, be he an accountant or any other expert, is to simply straightforward have him answer a question. If counsel are interested in knowing on cross-examination how he came to his conclusions, that's their privilege.

The Court: I don't follow you in your statement as to experts. What experts do you mean?

Mr. Ruiz: For example, when a party, let's say an accountant, testifies with respect to sums, I think the proper procedure is to ask him the conclusion.

The Court: We are not dealing with an expert here, are we? [141]

Mr. Ruiz: Now we are dealing with a public official.

The Court: Yes.

Mr. Ruiz: This public official has made an inventory. The inventory is in evidence. Now if the parties or anyone is interested in knowing how he reached that inventory, I think that is a proper way to examine him.

The Court: Is that the purpose you wanted?

Mr. Ruiz: Yes, your Honor.

The Court: I will limit it to that purpose.

Mr. Trowbridge: I would like to add something

(Testimony of Frank J. Fontes.)

to that. There is one statement that counsel made that does not follow, and that is that there is no duty on the administrator to tell anybody where the assets came from. All he has to do as administrator is to report to the Court what assets he came into possession of and to describe them and file a sworn inventory and have the assets appraised. He is not under any duty to anybody to say where the assets came from, and 99 times out of a hundred it would be hearsay anyway. And it isn't shown that Mr. Fontes knows of his own knowledge where these assets came from. If there is anybody in the Public Administrator's office who knows where the assets came from, let Mr. Ruiz produce them, but Mr. Fontes can't tell that.

The Court: Are you familiar with this item under discussion?

A. I can state what our records show. I compared a few of [142] the items with our ledger; I can tell that.

The Court: Very well; tell us about them.

A. All right.

Q. (By Mr. Ruiz): Do you have your ledger with you?

A. Yes, I have the ledger pages and the cash receipts book too.

Q. Fine.

A. As an illustration, the first item there is Eureka Federal Savings and Loan Association. They have got the amount at death, that is '51; that is the date they got above that column, a balance

(Testimony of Frank J. Fontes.)

of \$4,155.23. We collected \$4,217.56. Now the difference between what they have there and what we collected is this: We include in our collection a dividend for the first six months of '52 amounting to \$62.33 and the figure that we have—it shows the total on this letter from Eureka, \$4,155.23, exactly the same as they have. Now that is the Eureka.

Q. Now let me ask you a question on that, sir. Did that——

The Court: Pardon me; let him conclude and then you can question him.

A. Now the next one is Pacific National Bank, \$525.79. Let's see if I can find that here. \$525.79 appears on—those numbers up there are the estate numbers—that is, our number for the estate, our office number. It has that figure after the Pacific National Bank, balance of commercial account, \$525.79, [143] the same as is in the Federal report.

The next one is the Bank of America, 7th and Olive, Los Angeles. They have on the Federal report \$1,120.79. We have "Bank of America, 7th and Olive, balance in commercial account \$1,120.79."

Anglo-California, Market and Jones, \$433.24. We have Anglo-Cal. Bank, balance of savings account in the name of Edward W. Hutton \$433.24.

The next one is Anglo-California—that hasn't got anything in the balance, so skip that one.

Bank of America, Arguello and Geary. They show a balance of \$2,524.75. We show for the same bank the same amount.

The Bank of America, Trustee, Day and Night

(Testimony of Frank J. Fontes.)

Office. They show \$1,867.00. We show the same bank, the same amount.

Merrill Lynch. That is a broker. They show from the receipt from the broker a balance in his hands, \$792.10. Here it is, Merrill Lynch, balance brokerage account, \$792.10. That is the last one.

Q. (By Mr. Ruiz): Very well, sir. Now going back to the same accounts. The account with the Eureka Federal Savings, out of which the estate received \$4,155.23, approximately that sum——

A. Yes.

Q. The initial deposit of \$4,000.00 was made——

Mr. Monell: We will object to the testimony with regard [144] to the initial deposit because it is obviously hearsay, and the best person to testify to that would be the particular depository that received the funds. He is reading from a report either to the Administrator or to someone else, and not from any record of the corporation which had the deposit.

Q. (By Mr. Ruiz): What do your records indicate with respect to the initial deposit?

A. Well, in all fairness to the Court, I have a letter from the Eureka Federal Savings and Loan giving the opening date.

Mr. Monell: I will object to the introduction of a letter from the Eureka Savings and Loan Association as being based on hearsay and that the proper official of the Eureka Savings and Loan Association should be here to identify this account.

(Testimony of Frank J. Fontes.)

A. All I can say, we requested the information and this is what we got. Now I can't add anything to that.

The Court: This is in your records?

A. Yes, it is part of our file, your Honor.

The Court: I will allow it. The objection will be overruled.

Q. (By Mr. Ruiz): Of \$4,000. With respect to the Pacific National Bank of San Francisco, out of which the estate received approximately \$525.79——

A. I haven't got any information in my own files as to when that account was opened. At least I haven't seen it; I don't know; it may be here, but I couldn't find it. [145]

Q. This was a report given to Delger Trowbridge, the attorney, was it not?

A. What? I don't know which——

Q. This is part of a report.

A. I can't say. Mr. Trowbridge can enlighten you as to whether or not the Federal documents are attached to the Dolge report or not; I don't know.

Q. Again calling your attention to the document in which the same exhibit appears, you will notice it has the signature of W. A. Robison, subscribed and sworn to on the 26th day of August, 1953.

A. Yes.

Q. And that he says he is the administrator and has read the foregoing petition and knows the contents thereof.

A. Yes; it speaks for itself.

(Testimony of Frank J. Fontes.)

Q. And that is part of the files, the official Superior Court file, is that not true?

A. It is referred to as an exhibit.

Mr. Monell: May I ask how it is identified as an exhibit?

A. It says, "Your petitioner has received a statement from William Dolge and annexed hereto as Exhibit A is a copy of the letter written by Delger Trowbridge." But I don't know anything about it, whether there was a tax due or not, I don't know. [146]

Mr. Ruiz: We will find out right now. There is attached to said letter a comparative statement of assets listing eight accounts and the name of the account, it appearing that said decedent opened accounts in various names, other than Robert H. Sidebotham. Does that not appear to be a comparative account to which reference has been made?

A. Apparently the language is intended to refer to that document. That petition, your Honor, was a petition to fix the fees or the reasonable value of the services rendered by Dolge & Company. Now that is all I can tell you about it.

Q. And that petition was filed by your office?

A. Right.

Q. And pursuant to your petition the Court awarded some money?

A. Right.

Q. To these people?

A. Yes.

Q. So that they could present this document and make it a part of the official files?

A. Yes.

(Testimony of Frank J. Fontes.)

Q. Again I will call your attention to the Pacific National Bank of San Francisco, and it has November 21, 1946, date the account was established.

Mr. Monell: I object to that on the same grounds heretofore urged. [147]

The Court: I will allow this testimony to go in subject to a motion to strike and over your objection. It hasn't been argued. He has cited cases. I am going to keep my mind open on this matter in the interests of time in order to get a proper record here. That may or may not be admissible, I am not prepared to say.

Mr. Trowbridge: I would like to join in that objection on behalf of the defendant W. A. Robison.

The Court: Let the record so show.

Mr. Monell: For the purpose of the record may we state further that there is no statement in the petition for instructions that is filed here, whatever the petition may be named, that the matter attached to the petition is certified as being correct by the petitioner. It is merely a report of a letter addressed to Delger Trowbridge with an accompanying statement.

The Court: The answer to that is I am allowing this testimony to go in for the record.

Mr. Monell: I understand that, your Honor, but for our record we are merely stating the basis of our objection and you are letting it in subject to a motion to strike later on to be urged?

The Court: Yes.

(Testimony of Frank J. Fontes.)

Mr. Monell: Thank you very much.

Q. (By Mr. Ruiz): Said initial deposit was for the sum of [148] \$400; is that not true in this record to which reference I am making?

A. The record so states; I don't know.

The Court: That is the Pacific National Bank?

Mr. Ruiz: That is the Pacific National Bank of San Francisco.

The Court: What does it disclose?

Mr. Ruiz: Under the name of Robert Sidebotham there was an account established on November 21, 1946; the initial deposit was \$400.

The Court: Proceed.

Q. (By Mr. Ruiz): And in 1951 the sum of \$525.79 was taken from that account, was it not, by your administration?

A. We verified all those, the balances.

Q. Very well. Item No. 4 is the Bank of America National Trust and Savings Association, 7th and Olive Streets?

A. Yes.

Q. In the name of Russell Sidebotham, Trustee. The account was established February 24, 1947; the initial deposit——

Mr. Monell: If the Court please, I would like to add the further objection that that was apparently after the divorce was entered between the parties.

Mr. Ruiz: But we don't know whether it came before or afterwards.

Mr. Monell: You certainly have to show the rights of [149] these people and the administrator of the estate.

(Testimony of Frank J. Fontes.)

Mr. Ruiz: We are going to be able to argue that as a matter of law, your Honor.

Mr. Trowbridge: Then let me make clear that this account and the previous account were both opened after the divorce, your Honor, so what rights would the plaintiff have as to an account opened after the divorce?

The Court: In order to have a record I will allow it subject to a motion as I have indicated.

Mr. Monell: May we have a running objection to the entire line?

The Court: Let the record so show.

Mr. Trowbridge: On behalf of both parties.

Mr. Ruiz: I will so stipulate.

Q. The initial deposit was \$800 on that date, according to this report?

A. According to that record, yes.

Q. And the administrator in 1951 received \$1,120.79? A. Yes.

Q. Item No. 5 is the Anglo-California National Bank, Market-Jones office, San Francisco, in the name of Edward W. Hutton, Savings Account No. 12513. The date the account was established was February 7, 1946, according to this record?

A. Yes.

Q. And the initial deposit was \$610? [150]

A. According to that record, yes.

Q. And the estate received from that account \$433.24 in 1951, according to this record?

A. Yes, we received that.

Q. Item No. 6 is the same bank, the Market and

(Testimony of Frank J. Fontes.)

Jones office? A. Yes.

Q. Under the name of Edward W. Hutton, Trustee. That account was opened on August 31st, 1946, according to this record? A. Yes.

Q. With an initial deposit of \$867.27?

A. That is what that record says.

Q. And in 1951 there was nothing taken out of this account? A. Nothing.

Q. The same bank, the same party, on December 4, 1941, there was an initial deposit of \$300?

A. Yes.

Q. And that——

A. The record shows that, at least—I mean that report.

Q. And that account was closed on August 31, 1946? A. Yes, that is what the report states.

Q. Item No. 7, Bank of America National Trust and Savings Association, Arguello and Geary office.

A. Yes.

Q. Under the name of Russell R. Sidebotham? [151] A. Yes.

Q. That account indicates it was opened on May 14, 1947, for \$500?

A. That is what that report states.

Q. And the estate received \$2,524.75 in 1951?

A. Yes, we did receive that.

Q. Bank of America, Day and Night office, San Francisco, under the name of Russell Sidebotham, Trustee. This indicates that account was opened June 5, 1943.

(Testimony of Frank J. Fontes.)

A. Yes, it states that in the report.

Q. For the sum of \$1,203.14? A. Yes.

Q. And that the estate received \$1,867.00 on that account? A. Yes, we received it.

Q. Merrill, Lynch, Pierce, Fenner and Beane, San Francisco, under the name of Edward W. Hutton. The date that that account was established was February 8, 1946?

A. That is what that report says.

Q. And the initial deposit was \$1500?

A. Correct.

Q. And the estate received \$792.10 from that?

A. That's what we received.

Q. Very well. You inventoried certain real estate owned by the decedent, did you not?

A. Yes. [152]

Q. And that is set forth in the inventory, being Plaintiff's Exhibit 11? A. Exhibit 11?

Q. Yes, sir (handing document to witness).

A. Oh, the inventory, yes—the property out on Geary, you mean?

Q. Do any of your records show what money went to purchase that property?

A. No, they do not. There was some claim; I don't know whether any record shows that that—

Q. I am just referring to the records.

A. No, no.

Q. And that was sold, was it not, by the estate?

A. Yes, it was, yes.

Q. For \$27,300 cash? A. Correct.

Q. And that now forms a part of the estate?

(Testimony of Frank J. Fontes.)

A. Less broker's commission and a few expenses on the sale.

Q. Do you have any records, Mr. Fontes, concerning the extent of the entire estate of the decedent, not only here in California but in ancillary states?

A. Well, only what is shown by a copy of a Federal return; it shows the gross there of \$189,000.

Q. Do you know where the original—the original of the Federal return I imagine is with the Government? [153]

A. That is with the Government.

Q. Do you have a copy of that Federal return?

A. Yes, I have.

Q. May I see that? A. Yes.

Mr. Monell: We will object to the introduction of the Federal return, if the Court please, on the ground that this action is against an ancillary administrator in California and the return was filed by the domiciliary administrator in Idaho and includes assets not within the power and control of this local administrator. Therefore this Court would have no power to investigate assets outside of the state.

Mr. Ruiz: Is it your contention, counsel, that the domiciliary administrator is not a personal representative of the decedent?

Mr. Monell: This is not the domiciliary administrator here, though, Mr. Ruiz.

Mr. Ruiz: I understand.

(Testimony of Frank J. Fontes.)

Mr. Trowbridge: You are not suing the domiciliary there.

Mr. Ruiz: That is correct.

Mr. Trowbridge: Furthermore, we join in that objection, and we furthermore point out that the entire thing is hearsay. The return is prepared by some man in Idaho on information; we don't know where he got his information, and it is obviously hearsay. We object to it on that ground and also because it [154] is irrelevant, immaterial and incompetent.

The Court: How did these matters come into your possession?

A. We are in communication with the administrators in Colorado and Idaho and one other state and we exchanged copies of documents.

The Court: I am going to allow it to go in on the basis of what the record shows. That doesn't follow that you are bound by it. Let the record show that both sides will have an opportunity after the record is made up to assert their objections, if any, and a motion to strike, if any. I know of no other way to get at the merits of this case unless you gentlemen will suggest some way.

Mr. Monell: Well, sustain all our objections, your Honor.

The Court: You are not waiving any of your legal rights at all?

Mr. Trowbridge: We don't think that this is material which the Court should consider in deciding the merits of the case.

(Testimony of Frank J. Fontes.)

The Court: It may or may not become material. I may make a determination in this case——

Mr. Trowbridge: Aside from that we think it is hearsay and of course this Court cannot consider hearsay.

The Court: If you persuade the Court that it is hearsay, [155] it will go out.

Proceed, counsel.

Q. (By Mr. Ruiz): Can you state from this information what the extent of the entire estate of the decedent is as to value appraisal?

A. On paper and literally, we just read the figures, but there is not only the federal tax of \$149,000 but there is also a trustee's suit against us for the entire estate claiming that it is all investment trust monies, we don't own anything.

Q. Mr. Fontes, I have asked you if it had ever been determined that anybody had any portion of this estate or owned any portion of this estate other than the decedent? A. Yes.

Q. And I believe you answered it had never been so determined?

A. That is correct. I still say the same; I say there is a suit pending against us, half tried, in which about a hundred people claim that this is their money.

Q. And you are resisting those claims?

A. Yes, sir.

Q. Very well. Now tell me what the value of the entire estate is from those figures that we have identified?

(Testimony of Frank J. Fontes.)

A. I can't tell you, except to tell you on the contingency—even this report contains contingency claims against the [156] estate of \$100,000. It would only be a guess, your Honor; I don't know what the value is.

The Court: Well, that is the answer.

Q. (By Mr. Ruiz): What are the assets of the estate, not the liabilities?

A. What are the assets of the estate?

Q. Yes.

A. Right on hand now we have about 93,000 odd dollars, cash.

Q. That is with respect to California?

A. Yes.

Q. Is the entire estate around \$180,000?

Mr. Monell: I will object on the ground that it is obviously hearsay and this witness doesn't know.

A. I can only tell you what I have read in this report.

Q. (By Mr. Ruiz): Will you please tell us what you read in the report with respect to assets?

Mr. Monell: Just a moment. If the Court please, I will object to that on the ground that it is no more admissible in evidence than asking what he read in the newspaper.

Mr. Trowbridge: Same objection.

Mr. Ruiz: As long as it is admitted that the domiciliary administrators are the personal representatives of the decedent, it is just as though the decedent had written this.

The Court: He may state what the record dis-

(Testimony of Frank J. Fontes.)

closes, the record that he has in his office of Public Administrator. [157]

A. This doesn't seem to be the copy of that federal return. Have I got it? Did you make an exhibit out of it or something?

Mr. Ruiz: No; this is from your own files, sir. You showed me one this morning.

A. I loaned it to you a minute ago, a copy of the federal return. This is other stuff that you gave back to me. I thought you offered it in evidence.

Q. Did you give it to Mr. Trowbridge?

A. No, no, no. You had it during this session.

Q. It has got to be around here.

A. I thought it was marked or entered as an exhibit; I don't know which.

The Court: It may be in evidence.

Mr. Ruiz: No.

Mr. Monell: Have you got your watch, Mr. Fontes?

Mr. Ruiz: Is this the item?

A. No, no, it is like a book, the federal return.

Q. This only says \$149,000; the other one said \$180,000.

A. It's here. I don't know I got it back. Didn't you try to offer it in evidence? The figure shown here is \$189,564.68, and then it also recites subject to certain contingencies and I have called attention to the local contingencies.

Q. Thank you. And this is a United States estate tax [158] return? A. Yes.

Q. That you made reference to?

(Testimony of Frank J. Fontes.)

A. Right.

Q. And it makes reference to the report of Robert Russell Sidebotham known under various and sundry aliases?

A. That is correct.

Mr. Monell: Our objection runs to the entire line, your Honor.

The Court: Let the record so show.

Mr. Trowbridge: For all parties defendant.

Q. (By Mr. Ruiz): And it refers to various and sundry assets including safety deposit boxes in other jurisdictions?

A. Yes; it speaks for itself.

Q. It speaks for itself. Do you have any objection to my making this part of the record?

A. The Judge will rule on that.

Mr. Monell: We have very strenuous objections. That is what we have been talking about for half an hour.

Q. (By Mr. Ruiz): This is the return and it sets forth shares, certificates, cash and all of the assets. Is that not true, sir—all of the alleged assets?

A. What I mean is as far as I know—I assume that it is an attempt to set forth as true a statement as they were able to, yes. Is that being offered in evidence? [159]

Mr. Ruiz: No, I think we have out of it what we need. I mean, the Court will be able to determine a comparative analysis there. You may keep it, sir.

That will be all.

(Testimony of Frank J. Fontes.)

Cross-Examination

By Mr. Trowbridge:

Q. Mr. Fontes, does that federal estate tax return show what the net value of the estate is?

A. Well, that return, I think it has the usual deductions, but then on top of that it has got also what is listed as contingent liabilities, and it lists suits including the Ramsey suit. It does not include, I don't think, the O. A. Arthur suit to establish a trust to the entire estate.

Q. Does it show any net assets on which the domiciliary administrator paid any tax?

A. No, I don't think so.

Q. Would you mind looking at the recapitulation to see what it shows in the way of net estate and taxes due, if any?

The Court: I thought he didn't pay any tax.

Mr. Trowbridge: I think the fact was that they did not pay any tax because they contended that the estate was likely to be insolvent.

A. I wouldn't—let's see; they got the allowable deductions here in excess of \$129,564. Gross estate——

Q. Well, here Item 9 in sheet XIX under "Net estate," it is blank, isn't it? [160]

A. That is right.

Q. And it shows total deductions of \$189,564.68?

A. Yes.

(Testimony of Frank J. Fontes.)

Q. And it shows total gross estate of \$169,421.82, showing a deficit of about \$20,000.00, doesn't it?

A. Yes. I think I was in error in reading the last number there as being the gross estate. Actually the gross estate is \$169,421.82, and then the deductions plus the exemption add up to \$189,000.00, which of course would be no tax.

Mr. Trowbridge: Thank you.

Q. (By Mr. Monell): On top of that there is the O. A. Arthur suit that would consume the entire estate in California?

A. If that suit prevails, it will practically wipe out the entire estate.

Q. One other question, Mr. Fontes. Do you recall the \$64,000 that was in the safe deposit box that was paid over to you? Do you recall the denominations of that?

A. Yes, I have a record of that. Better take it down to see if the count comes out right. Are you ready?

Q. Yes.

A. Six \$1000 bills; 17 \$500 bills or greenbacks, whatever you want to call them; 39 50's. This looks like they slopped over a couple of figures one on top of the other. That is 431 \$100 bills.

Mr. Monell: No. [161]

A. The other one looks like two——

Mr. Trowbridge: No, it couldn't be.

The Witness: The figures are slopped over. You see the calculations, they have added them up to \$64,770. Right there it looks like 431 hundred dol-

(Testimony of Frank J. Fontes.)

lar bills, 43,100—no, 4,300—no, that is \$43,100. This figure is one over the other, but I think that is 216. One figure is written over the other, and the extension of it seems to be \$4,920.

Mr. Trowbridge: That is \$20 bills.

The Witness: Then there is 28 10's, that is \$280; and there is 4 5's, that is \$20. It is totaled up here \$64,770.

Mr. Monell: That is 246 20's?

A. Two what?

Q. 246 20's?

A. I don't know the 20's—it could be 286 or 216, I don't know which.

Q. But you have a total there of \$4920.

A. That is the way it looks. Is that the way it looks to you, the extension, \$4920?

Q. That would be 246; I mean it should be.

A. Well, maybe that is what it is. Maybe that is a 4—a 4 on top of an 8 or something.

The Court: The ultimate fact is \$64,000 what?

A. We got \$64,770.

The Court: Of what significance is the denomination of [162] these bills?

The Witness: I don't know; counsel asked the question.

Mr. Monell: I don't know; it might be interesting later in the trial.

The Court: That is all right. Proceed.

Mr. Monell: That is all, Mr. Fontes.

(Testimony of Frank J. Fontes.)

Redirect Examination

By Mr. Ruiz:

Q. In this estate that has a value of less than nothing there have been about \$13,000 worth of attorneys' fees paid on it so far, haven't there?

A. Yes, under order of court.

The Court: Well, you wouldn't complain about that, would you, being an attorney? What is that?

Mr. Ruiz: I think the Court can draw an inference that somebody is fighting over something.

Q. This Ramsey case was very important, too, wasn't it?

A. Well, I can't tell you; they are all important.

Q. Well, this Ramsey case that you made reference to as taking down this estate materially, that has already been settled, hasn't it?

A. Yes, under a petition addressed to the Probate Court.

Q. And under the settlement Mrs. Ramsey is going to get \$10,000, is she?

A. I don't remember the exact terms of the settlement. They were arranged between the counsel and Mr. Jepson, attorney for [163] Mrs. Ramsey.

Q. Isn't that a part of the file?

A. The file speaks for itself.

Mr. Trowbridge: Object to that as incompetent, irrelevant and immaterial. That has been settled. Why go into that?

The Court: We are not going to go into some

other court action here, are we? It serves no purpose.

Mr. Ruiz: Very well, that is all.

Mr. Monell: That is all. No questions.

The Witness: Is that all, your Honor?

The Court: As far as I am concerned, that is all.

Certificate of Reporter

I, W. A. Foster, official reporter and official reporter pro tem, certify that the foregoing transcript of 53 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER. [164]

SAM A. SCHNEIDER

called as a witness on behalf of the plaintiff; sworn.

The Court: What is your full name?

The Witness: Sam A. Schneider.

The Court: Where do you live?

The Witness: 1846 22nd Avenue.

The Court: Your business or occupation?

The Witness: Investigator.

The Court: Investigator?

The Witness: Firm of Krout & Schneider.

The Court: How long have you been so, Mr. Schneider?

(Testimony of Sam A. Schneider.)

The Witness: Twenty-eight years.

The Court: Here in San Francisco?

The Witness: Yes, sir.

The Court: The attorneys have got your history, I have no doubt about that. Proceed.

Direct Examination

By Mr. Ruiz:

Q. Were you called upon to investigate something in this case?

A. I personally was not, no.

Q. What is the name of your firm?

A. Krout & Schneider.

Q. Are you the Schneider that is on the second name?

A. Yes.

Q. As a member of that firm was the firm called to investigate [165] certain matters?

A. I assume, your Honor. I didn't handle it in any phase of it.

Q. Well, do you know or don't you know whether you handled it or not?

A. All I know is that we have a file.

Q. What is the name of the file?

A. I would have to look at this; I haven't look at it at all. In the Matter of the Estate of Robert Russell Sidebotham.

Q. Is that the first time you ever saw that just now?

A. I just took the file; I didn't look at it. I took it out. It was in the warehouse and I sent for it this morning. I took the file as it was.

(Testimony of Sam A. Schneider.)

Q. Have you ever seen that before?

A. No, I personally have not. Mr. Krout handled this entire matter.

The Court: Who?

The Witness: Mr. Krout, my partner.

Q. Where is he?

A. He is here. He has been away for the last two weeks and arrived back this morning from Los Angeles.

Q. (By Mr. Ruiz): He is in town?

A. Yes, he is here.

Q. Is he available as a witness in this case? [166]

A. He didn't handle the investigation himself either; he directed the investigation. He is available.

Q. And did the investigation have to do with the activities of the deceased, Robert Sidebotham?

A. I don't know that.

Q. Were you employed by someone—was your firm employed by someone to conduct this investigation?

A. I assume they were.

Q. Do you receive any monies that are paid to your firm?

A. The girl accounts for that.

Q. Do you know whether your firm received any monies that you got a part of for this investigation?

A. No, sir, I don't.

Q. What do you have in your possession there in the file?

A. Numerous papers, reports.

Q. Does the black file that you have, the first one there, contain a signature?

(Testimony of Sam A. Schneider.)

A. No signature; no, sir.

Q. Does it have any lettering to show where it is from?

Mr. Trowbridge: Just a moment, your Honor. I object to any examination on this file before I ask a few questions of Mr. Schneider because it is a confidential report. It says so right on top of it.

Q. Mr. Schneider, do you know whether I ordered that report from your firm? [167]

A. I don't know firsthand, no, sir; no, I had nothing to do with this file.

Mr. Trowbridge: I submit, your Honor, before counsel goes on a fishing expedition through that file that we had better get Mr. Krout here to find out where it came from and who ordered it, because it is a confidential communication which I ordered for the defense of three actions, including this action and it contains very important information which should be kept confidential in my duties as attorney for the defendant administrator in this case. Mr. Schneider has said very frankly he doesn't know a thing about it, and the way to go into it further, if Mr. Ruiz wants to do that, is to have him get Mr. Krout out here and we will find out whether it is confidential or not. I know this, because I ordered it, and it was sent to me under a forwarding letter, confidentially as attorney for the defendant in this case.

Mr. Monell: We join in the objection, if the Court please.

(Testimony of Sam A. Schneider.)

Mr. Trowbridge: Furthermore, it is all hearsay, everything in the file.

Mr. Ruiz: Is it your contention, counsel, that this information is privileged?

Mr. Trowbridge: Of course it is privileged. Just because the administrator here has a dual capacity, one as a Public Administrator, and second as administrator of a [168] private estate, doesn't change the rules about privity because he is defending here as an administrator of a private estate and I am his attorney, and this material was ordered by me for my information in defending this case. It is certainly privileged under Section 1881 of the Code of Civil Procedure and under common law rules.

Mr. Ruiz: Would you not admit, counsel, that in the event you had mailed me any portion of this report that you would have waived your privilege?

Mr. Trowbridge: No, I don't think so.

Mr. Ruiz: As a matter of fact, did you not mail me a portion of this report?

Mr. Trowbridge: I did.

Mr. Ruiz: It is no longer privileged.

Mr. Trowbridge: I don't agree with you at all. In the first place, the privilege has to be waived by the client; in the second place, the privilege was not waived for the purpose of introducing it in evidence.

The Court: Maybe I can be helpful at this juncture. The witness on the stand indicates he knows nothing about it. Are there any further questions?

(Testimony of Sam A. Schneider.)

Mr. Ruiz: I want to have him compare what ever records he has with a part of the record that was mailed to me by counsel who now says it is privileged and thereby waived the privilege. [169]

The Court: Proceed.

Q. (By Mr. Ruiz): I will show you here about 40 pages concerning the activities of Mr. Sidebotham and ask you if you can locate those pages among your reports concerning the decedent's activities with respect to oil leases, and encompassing a period not only after the year 1947 but before the year 1947 as well.

Mr. Trowbridge: Your Honor, it is all based on reports from an investigator who isn't in court. It is obvious it is hearsay. On no possible theory could you escape the hearsay rule. Certainly Mr. Schneider didn't make the report and Mr. Krout didn't make the report.

Q. Isn't it correct in your office that all of these investigations are turned over to independent—I mean investigators? A. Employees.

Q. —who go out on the job and they come back and they dictate the report?

A. No, they write the report, which is then re-typed in the office.

Q. The investigator writes the report?

A. Yes.

Mr. Trowbridge: There is the man they should bring in here.

The Court: What is his name?

A. Now that I don't know. Mr. Krout would

(Testimony of Sam A. Schneider.)

know that, the [170] man assigned to it or the investigator assigned to it.

The Court: Who was assigned to this case?

A. Who was assigned to it?

The Court: Yes.

A. Mr. Krout handled the investigation. He assigned someone. I don't know. These reports don't give the name of the investigator.

Q. I understand. Is he the one that handled this transaction? A. Yes, sir.

Q. In its entirety?

A. Yes, sir; that is, he controlled the operation of the investigator.

Mr. Ruiz: Mr. Trowbridge, will you have Mr. Krout here tomorrow morning?

Mr. Trowbridge: He isn't my party. I have no control over Mr. Krout.

Mr. Ruiz: There is a petition on file, your Honor, which indicates that the administrator and Mr. Trowbridge—it was Mr. Trowbridge that recommended his firm and this firm reported to Mr. Trowbridge the results of his findings.

The Court: If I followed counsel, he will be here tomorrow morning.

Mr. Trowbridge: I don't know. I have no control over him. [171]

The Court: But you indicated he is available and he will be here tomorrow morning.

Mr. Trowbridge: If Mr. Ruiz wants to subpoena him, it is all right with me. I have no way of getting him out here.

(Testimony of Sam A. Schneider.)

The Court: Very well. Subpoena him.

Mr. Ruiz: I will subpoena him. I would like at this time to have the Court impound those documents.

The Court: Let them be admitted in evidence for purposes of identification.

Mr. Ruiz: For purposes of identification.

Mr. Trowbridge: I would like to request, your Honor, that the envelope be sealed because there are confidential matters in there not only pertaining to this case but also to the other case.

The Court: Have you got some stickum there, Mr. Clerk?

The Clerk: I can take care of sealing it, yes, your Honor.

Plaintiff's Exhibit 13 for identification.

(Whereupon, papers referred to were marked Plaintiff's Exhibit No. 13 for identification and were placed in a sealed envelope.)

Q. (By Mr. Ruiz): You say that Mr. Krout is in town? A. Yes.

Q. When did you see him?

A. This morning. He arrived back this morning. [172]

Q. Where did you see him, sir?

A. In the office.

Q. And he is your associate? A. Yes.

Q. Can you give me his home address, sir?

A. He lives in San Mateo. I don't have the ad-

(Testimony of Sam A. Schneider.)

dress here. It is in the office. He lives in San Mateo.

Q. Can you give me his telephone number, if you know?

The Court: I think there ought to be some understanding here with relation to his appearance without issuing a subpoena.

Mr. Trowbridge: I have no control over him or I would bring him in. If they can get him here, it is all right with me.

Mr. Ruiz: Will this witness be ordered to return tomorrow morning?

The Court: The witness on the stand?

Mr. Ruiz: Yes, your Honor.

The Court: For what purpose?

Mr. Ruiz: Because I am going to look up some law tonight in the law library and I want him here because he is a member of the firm and we have some matters here for identification. I think I can pursue this be it better prepared. Apparently there is an obvious effort here to conceal.

The Court: There won't be anybody there. You have a [173] partner, do you? A. Yes, sir.

The Court: There won't be anybody to take care of the business. Let's take one of them at a time.

Mr. Ruiz: The Court is optimistic. I don't know whether the other partner will be here.

The Court: Counsel indicates that he will. Do I understand you, counsel?

Mr. Trowbridge: What was that, your Honor?

(Testimony of Sam A. Schneider.)

The Court: Do I understand that he will be here?

Mr. Trowbridge: I don't know. To be perfectly frank with the Court, this is not the only firm we have used, and since this job was done I have employed another investigator. They are independent contractors. I have no control over their movements; I can't order them to be out here tomorrow morning.

The Court: Well, I want to make the Court's position clear. Before I get through with this case—I don't want to do violence to the law, but I wish to hear every detail of it insofar as getting the merits of this case if it takes the next month.

Mr. Trowbridge: We understand that.

The Court: I say that kindly.

Mr. Trowbridge: Yes.

The Court: So we may as well meet this situation for [174] what it is worth.

Mr. Trowbridge: I am not trying to conceal Mr. Krout. I have no control over him.

The Court: I know. You have a right to protect the people that you represent.

Mr. Trowbridge: It isn't that.

The Court: I don't want to have to return you tomorrow, but I want to have some assurance that either one or both of you will be here. What will we do about that? I want to make it convenient for everybody in interest if possible.

The Witness: I will be back if he wishes.

The Court: Do I understand you insist on the witness coming back?

Mr. Ruiz: Yes, I do, your Honor.

The Court: Very well. Step down.

Maybe we will take a recess and clear up some of this fog.

Mr. Monell: If the Court please, before you take the recess, Mr. Schneider says that he can get his partner out here tomorrow morning.

The Court: If he does, is he excused?

Mr. Ruiz: If his partner comes, I will excuse him, sir.

The Witness: O.K.

The Court: That is what I was trying to get at.

(Recess.) [175]

Mr. Ruiz: If the Court please, I believe that Mr. Trowbridge has stated that he has a report made by William Dolge & Company, licensed accountants and investigators. These licensed accountants and investigators made a report with respect to assets accumulated subsequently to 1946 in this estate and I think it is quite material. I would like to request of Attorney Trowbridge that he produce that report. That report, according to the administrator, was paid for out of administrative funds for the purposes of gathering information.

We must remember one thing: that all of these matters are items that were continually within the knowledge of the decedent who is no longer with us; that the decedent theoretically is a party to this action, and I believe the Court has the authority

and the power to order those produced; otherwise, that type of concealment would continue the perpetration of a fraud and concealment.

Mr. Trowbridge: Your Honor, in spite of the honeyed words of Mr. Ruiz, it is all an attempt to try to violate the privilege between client and attorney. This letter, this report was rendered at my request. I employed the firm of William Dolge & Company to make some investigations for me to aid the defense of this case and of two other cases. The report is addressed to me personally and it covers investigations involving this case as well as other cases and [176] there is no claim that privilege has been waived. Mr. Ruiz himself would have to admit it is privileged. And just because it happens to be paid for by estate funds doesn't mean anything. Every estate that is defending a suit has to pay the expenses of defending it, naturally. William Dolge & Company wouldn't work for me for nothing and I wouldn't pay for it out of my own pocket. Naturally I would expect the estate to reimburse me for the incurring of the expense of this report, and I submit that it is privileged.

The law writers—Professor Wigmore, for instance—recognizes in his textbooks that it may work some hardship in some cases, but in view of the policy of the law dealing with privilege between client and attorney and priest and confessor and physicians and so on, there is a higher public policy that requires that those matters be kept secret. And for that reason I stand on that privilege. Fur-

thermore, the report is all hearsay, every bit of it, and incompetent for that and other reasons.

The Court: Do you have any authorities to sustain your position, and if so, what are they?

Mr. Ruiz: May I be permitted to present authorities in the morning on that, your Honor?

The Court: Very well.

Mr. Monell: I will be glad to cite some cases supporting our theory in the matter, if the Court please. [177]

Mr. Ruiz: Will you kindly do so?

The Court: Save them until tomorrow morning.

Mr. Ruiz: Inasmuch as I had expected to devote this particular time to the matters we have been discussing, I have another witness here, but it is defensive matter, if I may call it out of order, and dismiss him.

The Court: Is that agreeable, gentlemen?

Mr. Monell: Yes, sir.

Mr. Ruiz: Mr. Scardino.

JOSEPH SCARDINO

called as a witness on behalf of plaintiff; sworn.

The Court: What is your full name?

A. Joseph Scardino.

Q. How do you spell your name?

A. S-c-a-r-d-i-n-o.

The Court: Where do you live?

A. Oakland.

Q. At what address?

A. 1516 Tenth Street.

Q. Tenth Streect? A. Yes.

(Testimony of Joseph Scardino.)

Q. What is your business or occupation?

A. Laborer.

Q. Employed where?

A. Albers Milling Company. [178]

Q. How long have you been so employed?

A. Five years.

The Court: Take the witness.

Direct Examination

By Mr. Ruiz:

Q. Do you reside in Oakland with your family, sir? A. Yes, sir.

Q. Are you acquainted with an address known as 380 Union Avenue? A. Yes, sir.

Q. What kind of a building is it?

A. It is a three-story building.

Q. Is it flats? A. Flats.

Q. And around the year 1940 was that building owned by someone that you know?

A. Owned by my father and mother.

Q. Owned by your father and mother?

A. Yes.

Q. Did you know Mr. Robert Sidebotham?

A. Well, with my father one Sunday morning I met him upstairs when he was paying the rent.

Q. Just a minute. Did you know Mr. Robert Sidebotham?

A. I was introduced by Mrs. Sidebotham.

Q. Just listen to my question. Did you see him? [179] A. Yes.

(Testimony of Joseph Scardino.)

Q. Very well. Did you have occasion to visit these flats during the year 1940?

A. Yes, I had.

Q. On more than one occasion? A. Yes.

Q. On many occasions?

A. My mother was sick and I had to go up there and see her.

The Court: Speak up. I can't hear you.

The Witness: My mother was sick in bed.

Q. (By Mr. Ruiz): And you went up there to visit your mother? A. Yes.

Q. When was the first time you ever met Mr. Robert Sidebotham?

A. Upstairs in my father's apartment.

Q. Was that at 380 Union Street?

A. Yes, sir.

Q. And do you know when in 1940 that was?

A. Well, it was about February.

Q. About February of that year, 1940?

A. 1940, yes, sir.

Q. And how do you know it was the year 1940?

A. I happened to know because my father and I, we are not on speaking terms for ten years. [180]

Q. Just a moment. I can anticipate the difficulty the reporter has got. I am having some difficulty myself. Would you read back the question, Mr. Reporter?

(Question read.)

A. My father and I were disagreeable in talking terms for ten years; this just happened in 1939.

(Testimony of Joseph Scardino.)

The Court: Speak up louder.

The Witness: I can't talk very loud.

The Court: Yes, you can. I realize that you just went on the stand and probably not used to being in court. Repeat that over again and slowly so the reporter can get it, please. Read the question again for him.

(Question reread.)

A. My father and I were mad at each other for ten years and I wasn't having—my father was sick and some friend of his asked me to go down and see him; my mother was sick, so they took me over there. That is how I know it was 1940.

Q. (By Mr. Ruiz): And when did you first meet Mr. Sidebotham?

A. That was on a Sunday morning.

Q. Of what month? A. In February.

Q. Of 1940? A. 1940, that's right.

Q. Was Mrs. Sidebotham there, too? [181]

A. Yes, sir.

Q. Was he introduced to you by someone?

A. By Mrs. Sidebotham.

Q. What did she say?

A. "Meet my husband."

Q. What did he say?

A. "Pleased to know you." We shook hands.

Q. What was he doing then?

A. He was paying rent. He just got through paying his rent when I got upstairs.

(Testimony of Joseph Scardino.)

Q. Who did he pay the rent to?

A. My father.

Q. By the way, is your father living?

A. No, sir.

Q. Is your mother now living?

A. No, sir.

Q. Did anything else happen?

A. No, just had a few drinks, that's all. After awhile the lady left and I stayed with my father the rest of the day.

Q. Did you see Mr. Sidebotham after that?

A. A few weeks after I met him again.

Q. How long afterwards?

A. About three weeks after. A Sunday morning I came to see my father and he happened to be out there by his apartment house stairs and he called us in to have a drink or smoke a [182] cigar in his front room. We stayed about a half an hour and then I went downstairs to see my mother.

Q. Who was smoking a cigar?

A. Mr. Sidebotham.

Q. Mr. Sidebotham? A. Yes.

Q. Did anything else happen?

A. No; just had a few drinks, that's all.

Q. Were you alone or with someone?

A. No; my wife was with me.

Q. You had your wife with you at that time?

A. Yes.

Q. And how long did Mr. Sidebotham stay this time?

(Testimony of Joseph Scardino.)

A. Well, we stayed a half an hour and went upstairs to see my mother so I don't know what happened after that.

Q. You say you went up to your mother's?

A. I stayed about a half an hour and then I went upstairs. My wife and I went upstairs to see my mother and father.

Q. Did you ever see Mr. Sidebotham any time after that? A. Well, occasionally.

Q. Pardon?

A. Yes, about four times altogether.

Q. How many times? A. Four times.

Q. Four times you saw him there? [183]

A. Yes.

Mr. Ruiz: You may cross-examine.

Mr. Trowbridge: No questions.

The Court: Step down.

Mr. Ruiz: I have no further witnesses at this time, your Honor.

I wanted to utilize the time. We did some mathematics together and I expected to get some additional information through the witness.

Mr. Monell: Do you need the probate records?
'The clerk is still here.

Mr. Ruiz: There is one record I haven't been able to locate yet.

The Court: The clerk may be able to help you.

Mr. Ruiz: There is a petition here for this firm of Dolge & Company is requested to procure information after 1946. I remember reading it. I think that the date is very important and I would like to make reference to that. That is the only other item of record that I would need. Other than that

I don't need the records any more, sir. But I have to have the records kept over here for that purpose.

The Court: The clerk is always accommodating. He will help you in any way he can, I am sure.

Mr. Ruiz: I may be able to pick it up once again if I go through this rather hurriedly. I have found it. I would [184] like to read in evidence a petition for instructions filed October 13, 1953, by Henry J. Boyen, attorney for W. A. Robison, under verification before a notary public the 9th day of October, 1953:

“Petition for Instructions.

“Petition of W. A. Robison as administrator of the estate of the above-named decedent specifically shows that heretofore an order was made herein employing William Dolge & Company to perform certain searches in connection with the above-entitled estate, and in particular concerning the earnings of the decedent on or about the year 1946, to the time of his death, and by the terms of said order, said William Dolge & Company were to be paid on an hourly basis not to exceed the sum of \$1,000 unless otherwise ordered by this Court.”

That is the portion that I wanted to read into evidence.

Mr. Trowbridge: Pardon me just a minute, your Honor. No questions.

Mr. Ruiz: That is all, your Honor.

May we adjourn until tomorrow morning? I wanted to go into material with these other people if I can get this man back.

The Court: Very well. We will take an adjournment until 10:00 o'clock tomorrow morning.

(Thereupon, further hearing continued to October 26, 1955.) [185]

Wednesday, October 26, 1955—10:00 A.M.

The Clerk: Sidebotham v. Robison, for further trial.

Mr. Ruiz: Ready.

Mr. Trowbridge: Ready.

Mr. Ruiz: Is there a representative of Krout & Schneider in the courtroom?

Mr. Trowbridge: Yes.

Mr. Ruiz: Will you take the stand, sir?

J. E. KROUT

called as a witness of behalf of plaintiff; sworn.

The Clerk: State your full name, your occupation and your address to the Court.

A. J. E. Krout. I am a partner in the firm of Krout & Schneider, investigators, 350 Sansome Street.

Direct Examination

By Mr. Ruiz:

Q. As investigators, what do you do, sir, generally? A. General investigating, all types.

Q. Were your services retained in this case by anybody? A. By Mr. Trowbridge.

Q. That is in connection with the estate of Sidebotham? A. That is correct, sir.

(Testimony of J. E. Krout.)

Q. And did you do certain work in connection with that case? A. We did. [186]

Q. And did you examine many records and documents and interview many persons?

A. No, I didn't do the work personally. The work was—the case was assigned to us by Mr. Trowbridge and I assigned it to one of our investigators to do.

Q. Was that investigator under your supervision? A. Yes, sir.

Q. Was a report rendered to you?

A. The report is rendered to me.

Q. And in turn did you render that report to Mr. Trowbridge? A. Yes, sir.

Q. Did this man under your supervision examine records and documents and interview many persons?

A. I haven't seen the file for quite a few months but, as I remember it, that was the gist of what we had to do.

Q. I will hand you an envelope which is marked Plaintiff's Exhibit for identification No. 13 and ask you to open that and examine the contents.

A. Yes, this is our file.

Q. Will you please tell us what the file note indicates, but what it is made up of, what kind of reports are there?

A. Well, the file is made up of reports as rendered to us by the investigator who was doing the work, and then the compilation of these reports

(Testimony of J. E. Krout.)

were made up to be submitted to Mr. Trowbridge. [187]

Q. I'm calling your attention, sir, to a document filed in this action which is denominated "Request for Answers Pursuant to Rule 36, F.R.C.P.," and more particularly to a series of documents beginning with page 1, called "Oil and Gas Lease," and ending with page 70. Will you kindly glance through this for purposes of refreshing your memory?

Mr. Trowbridge: Where does that start?

Mr. Ruiz: Page 1 to page 70.

Mr. Trowbridge: 1 to 70 of the interrogatories?

Mr. Ruiz: It is in the file. You were served with a copy.

Mr. Trowbridge: May I see that a minute?

The Witness: I don't remember any of this, counsel.

Q. (By Mr. Ruiz): Will you examine your files and see if you can locate a report that you gave to Mr. Trowbridge?

A. On any of these matters?

Q. On precisely those matters.

Mr. Ruiz: Counsel, will you stipulate that those items to which I have made reference were items that were handed to you by this firm?

Mr. Trowbridge: I am trying to refresh my memory—if you will just give me a minute or two to refresh my memory. I will make this answer: There seem to be about 71 of these pages—70, I understand. Without taking them each one sepa-

(Testimony of J. E. Krout.)

rately, I wouldn't know for sure, but I would [188] say that I think that these are probably copies of exhibits attached to the report of Krout & Schneider. They look familiar to me and I think that is probably correct.

The Court: They may go in subject to your motion?

Mr. Trowbridge: Subject to the motion.

The Court: And any correction?

Mr. Trowbridge: Yes, that may be made.

Mr. Ruiz: Very well.

Mr. Trowbridge: I am not agreeing to the admissibility of the evidence—I want to argue that further—but I mean as far as identification is concerned, I would be willing to stipulate, subject to correction, that those seem to be copies of those exhibits.

Q. (By Mr. Ruiz): Now, taking into consideration the statement made by Attorney Trowbridge, do you recall that those were exhibits attached to a report made by your investigator under your supervision?

A. Well, we did supply him with a lot of exhibits, copies of which I don't have.

Q. That is the reason I referred your attention to those particular copies. Taking into consideration what Attorney Trowbridge has said, that those exhibits came from your firm, would you say that those were the exhibits you furnished?

A. I wouldn't want to say unless I would check them [189] carefully with what I have in my report

(Testimony of J. E. Krout.)

here. I know we did furnish him with a bunch of exhibits.

Q. Well, do you want to check those carefully or do you want to accept the stipulation or statement by Attorney Trowbridge?

A. I will accept the stipulation made by counsel.

Q. How much was your firm paid to make this investigation, sir?

A. Oh, I don't have the bill here, but I think it was close to a thousand dollars.

Q. Is it not a fact, sir, that predicated upon those investigations that you made, that you ascertained that Mr. Sidebotham was extremely busy prior to the year 1946 in the field of oil and gas leasing and speculation?

Mr. Trowbridge: Just a moment, please. That calls, first, for the conclusion of the witness, and, secondly, anything that he would testify to would obviously be hearsay. I think Mr. Schneider testified yesterday that this report was dictated by an investigator to a stenographer, then the stenographer wrote it, and they submitted it to Mr. Krout. I think that is Mr. Schneider's testimony—it would be the usual custom. Now, anything that Mr. Krout would testify to in answer to this question would necessarily have to be based on about three steps of hearsay. I therefore object to it as being incompetent, irrelevant and immaterial and [190] hearsay.

Mr. Monell: We join in the objection, if the Court please.

(Testimony of J. E. Krout.)

Mr. Ruiz: I am looking for some law if the Court will indulge me just a second.

This case indicates that there was no record, no original evidence concerning the books of account. When there is no original record, then secondary, indirect and circumstantial evidence is admissible. Oftentimes the only evidence available is negative evidence.

We do not know and cannot tell what documents were accessible to this firm until we know what they inspected and examined. If they examined original records, which were numerous and which the matter marked for identification indicates, and the evidence sought is only a general result of the whole such as do these indicate that he was very busy, do these indicate that he had many transactions, then that is admissible because it constitutes a summary.

This was done in the ordinary course of employment by this man on behalf of the administrator.

Code of Civil Procedure, Section 1937, the original of any writing must be produced except as provided in Civil Code 1855, which means that a person who has gone into that material can testify to a general conclusion.

Mr. Trowbridge: Will you read that Section 1855?

Mr. Ruiz: I don't have that one out here. If you have, [191] I will be very glad to.

Mr. Trowbridge: No, I haven't.

Mr. Ruiz: May we have that code section?

(Testimony of J. E. Krout.)

Counsel has asked for it—the Civil Code of Procedure.

Q. In this connection, this man interviewed many people, didn't he?

A. It was a lady, sir.

Q. This lady interviewed many people?

A. Yes, sir.

Q. She had many private conversations and had dealings with Mr. Sidebotham, didn't she?

A. I believe so.

Q. And many of those persons were asked to exhibit leases and documents, were they not?

A. As far as I remember, yes.

Q. And this encompassed the activities of Mr. Sidebotham for how far back?

A. I would have to see this report.

Q. What is the year that your report indicates?

A. Counsel, we worked this matter in 1952, and I haven't seen this report in many, many months, so I don't recall exactly what is in it.

Q. Did you make any memorandum as to how far back you went in your investigation?

A. Well, it would show in the report, but I would have to [192] read this whole report to find out.

Q. Do you want to read through to see if you can find a date and number while we are waiting for the Civil Code of Procedure, sir?

A. Yes.

The Court: Code of Civil Procedure?

(Testimony of J. E. Krout.)

Mr. Ruiz: California State Code of Civil Procedure.

The Court: California?

Mr. Ruiz: Yes, sir.

Section 1937, CCP.

“Original writing to be produced or accounted for. The original writing must be produced and proved except as provided in Sections 1855 and 1919.”

The Court: What section is this?

Mr. Ruiz: Section 1855:

“Contents of writing how proved. There can be no evidence of the contents of a writing other than the writing except in the following cases: * * * Subsection 5: When the writing consists of numerous accounts or documents which cannot be examined in court without great loss of time and the evidence sought from them is only a general result of the whole.”

The Court: What is the other section?

Mr. Ruiz: Pardon, sir. That is the section.

The Court: There is another section, isn't [193] there? It quotes two sections.

Mr. Ruiz: There are five sections: “In the cases mentioned in subdivisions 3 and 4 a copy of the original or of the record must be produced; of those mentioned in subdivision 1, either a copy or oral evidence of the contents.”

Subdivision 5 is what I am relying upon. In other words, the evidence here is that there were interviews had with private parties; that private

(Testimony of J. E. Krout.)

parties exhibited documents; that private parties had conversations with reference to oil and gas relationships with the decedent. The result of the conferences and the result of the numerous documents is one isolated fact which I am asking this witness, and that was the amount of activity. I am not asking him for anything else but that. I ask him how far he went back so that this Court may not be able to indulge in an inference later on that the man didn't do anything before 1946. There must be some evidence, in view of the lack of evidence, of records, that this man was actively engaged in this business prior to that time. That is the only thing I am asking from this investigator.

Mr. Trowbridge: Code Section 1855 has nothing to do at all with the subject of hearsay. And I say again that it is quite obvious that this is hearsay based on hearsay.

This Section 1855, subsection 5, applies and is used [194] frequently in a situation where accountants have gone over a set of books personally and made a summary of what the books show, a summary of what the journal shows and a summary of what the ledger shows, and then the accountant is allowed to testify from his summary what the books showed, subject of course to cross-examination and correction as to omissions and errors. But this doesn't apply to this case in any way, as I see it, and it certainly doesn't cover our objection that it is hearsay.

(Testimony of J. E. Krout.)

The Court: Will you read the question again, Mr. Reporter?

(Following question read: "Is it not a fact, sir, that predicated upon those investigations that you made that you ascertained that Mr. Sidebotham was extremely busy prior to the year 1946 in the field of oil and gas leasing and speculation?")

The Court: The objection will be overruled. I will allow it in subject to a motion to strike over your objection.

Q. (By Mr. Ruiz): Did you understand the question? A. Yes, sir.

Q. Will you answer it, sir?

A. I can't answer that question honestly, counsel. I think if we are to go into this report my investigator who made it and would be familiar with what she did, should be here to testify [195] from it.

The Court: Is she still in your employ?

A. Yes, sir. You see, I merely supervised this investigation; she handled all the details and made the reports.

Q. (By Mr. Ruiz): Is she in town?

A. Yes, she is here.

Q. She is in your employ? A. Yes, sir.

Q. Will you have her come to court this morning? A. This morning?

Q. Yes.

A. Well, I don't know where she is right now.

(Testimony of J. E. Krout.)

She is out on a case. I can have her come up here as soon as I can reach her.

Mr. Ruiz: Well, we may be able to cut across here. You were the supervisor and I have called your attention to 70 documents.

A. Yes, now——

Q. I have likewise called your attention to your records and more particularly to indicate how far back you went in your investigation. Do your records show that?

A. Whatever these records would indicate, that is how far back we went.

Q. Whatever these records would indicate——

A. Whatever these exhibits, if they are the exhibits that I gave to Mr. Trowbridge, then that would indicate the length [196] of time that we covered.

Q. In other words, here is one that says May '35, October, 1935; November, 1935——

Mr. Trowbridge: Just a moment. I think I can help here. There seems to be a misunderstanding on the part of Mr. Krout. Mr. Ruiz asked him what period of time his report seemed to cover, meaning by that what period of time the investigation covered, what years of the activity of Mr. Sidebotham the report covered; is that right?

Mr. Ruiz: Yes.

The Witness: You mean the time that he worked on it?

Mr. Trowbridge: No. Mr. Krout seemed to have the impression that these exhibits which are refer-

(Testimony of J. E. Krout.)

ences to deeds showed the period covered. Now, I think, if I may interrupt, that what Mr. Ruiz has in mind, Mr. Krout, is what period of time of the activities of Mr. Sidebotham was covered, not necessarily the dates of deeds. And another question I would like to ask to clarify is this: Isn't it a fact that your report was primarily a report on Mrs. Ramsey?

A. Primarily.

Q. And would your reports show whether you made any report as to the activities of Mr. Sidebotham?

A. Not other than what these exhibits would indicate.

Q. Isn't it a fact that anything in the report about Mr. Sidebotham is incidental and that the main purpose of the [197] report was to give a report on the life, business transactions, property holdings and so on of Mrs. Ramsey?

A. That is correct.

Mr. Ruiz: Counsel, for the purpose of cutting across, will you stipulate, without the need of bringing back the file again from the County Clerk's office, that there is a contract there entered into between Mrs. Ramsey and Mr. Sidebotham to the effect that anything and everything taken in her name or his name would constitute them tenants in common? Will you stipulate to that so we can across it in this action?

Mr. Trowbridge: That is substantially correct.

Mr. Ruiz: Very well.

(Testimony of J. E. Krout.)

Q. Can you get that girl here?

A. Yes, I can get her.

Mr. Ruiz: As soon as we finish with this witness, your Honor, the plaintiff is resting in this case.

The Court: Well, what is before the Court now?

Q. (By Mr. Ruiz): Do you wish to go to the telephone and call her?

A. I will call my office and see if she is there.

The Court: We will take a recess.

(Recess.)

Mr. Ruiz: If the Court please, we are ready to enter into a stipulation, and for that purpose the necessity of bringing the employee of the last witness will be dispensed [198] with.

It has been stipulated by counsel representing the respective parties that the evidence would show that prior to the year 1946—that is, from the year 1935 to and through 1946—the decedent engaged in numerous transactions concerning oil and gas leases wherein he has some interest; that said transactions numbered approximately 70.

Mr. Trowbridge: That is correct, your Honor.

Mr. Monell: We will so stipulate, your Honor.

Mr. Ruiz: There is a matter marked for identification here, being Plaintiff's Exhibit No. 13 for identification. It is stipulated by counsel representing the parties here that the same may be withdrawn at this time.

Mr. Trowbridge: It is to be returned to the firm

of Krout & Schneider because it is part of their records.

The Court: Very well.

Mr. Ruiz: The plaintiff rests.

Mr. Trowbridge: This comes as a good deal of a surprise to us, your Honor. I don't know that we can fill up all of the time until noon, but I have some documentary evidence which I will submit to counsel for plaintiff and we may then ask for a continuance until 2:00 o'clock.

Mr. Ruiz: No objection.

Mr. Trowbridge: The first piece of evidence we desire to offer at this time is a grant deed from Ruth M. Ramsey, [199] a widow, granting Russell Sidebotham, a single man, all that property situated in the City and County of San Francisco, State of California, described as follows—rather than reading that description, will you stipulate, or do you want to look it up as to the description, that this is the same case of real estate described in the inventory and appraised at \$30,000?

Mr. Ruiz: I will so stipulate.

Mr. Trowbridge: It is signed Ruth M. Ramsey. It is dated March 6, 1950, recorded at the request of the City Title Insurance Company at 30 minutes past 8:00 a.m. March 14, 1950.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit H admitted and filed in evidence.

(Whereupon grant deed was received in evidence and marked Defendant's Exhibit H.)

Mr. Trowbridge: The next document is a certified copy of official certificate of registration, Office of the Registrar of Voters, City and County of San Francisco, State of California, Precinct 33, Assembly District 19; name, Robert Russell Sidebotham; residence, 10 Rossi Avenue; occupation, salesman; height, five feet nine inches; nativity, Idaho. Date of registration: September 19, 1942. Political affiliation: Democratic Party. The other blanks [200] are not filled in. It says, "Date of Registration, September 19, 1942; political affiliation, Democratic Party"; and in the lower left-hand corner it says, "Cancelled M.V. '50."

Now, will you further stipulate that that address, 10 Rossi Street, is the same address as the transaction of the conveyance of real estate by Mrs. Ramsey?

Mr. Monell: No.

Mr. Trowbridge: No, I don't think you understand.

Mr. Monell: No, it isn't the same place.

Mr. Trowbridge: This is the residence of Mrs. Ramsey who is mentioned in the deed.

Mr. Ruiz: This is the address of Mrs. Ramsey where she was living.

Mr. Trowbridge: The apartment house covered by the deed is on Geary Street.

Mr. Ruiz: The Mrs. Ramsey mentioned in the deed is the same Mrs. Ramsey to which reference I made with respect to the contract he had with her?

Mr. Trowbridge: That is correct. The same Mrs. Ramsey.

The Court: Let it be admitted and marked Defendant's exhibit.

The Clerk: Defendant's Exhibit I admitted and filed in evidence.

(Whereupon certificate of registration was received in evidence and marked Defendant's Exhibit I.) [201]

* * *

We will now offer in evidence, your Honor, on behalf of both defendants, a receipt, or I guess it was the original bill from the Pacific Gas & Electric Company for June, 1950, for gas and electricity in the total sum of \$5.97, made out to R. R. Sidebotham, 10 Rossi Avenue, San Francisco 18, California, 5021½ Geary Boulevard, which was the address of the apartment house that Mr. Sidebotham owned, the grant deed for which we have just introduced in evidence.

The Court: The purpose of the offer is what?

Mr. Trowbridge: It goes toward laches, which we will argue later.

The Court: Let it be admitted and filed.

The Clerk: Defendant's Exhibit J admitted and filed in [203] evidence.

(Whereupon PG&E bill was marked Defendant's Exhibit J and received in evidence.)

Mr. Trowbridge: And for the same purpose we introduce the tax bill covering Block No. 1446, Lot No. 25, which is the Geary Boulevard property owned by Mr. Sidebotham. It is for 1951-1952, and

it is made out to Russell Sidebotham, 10 Rossi, and there is an item in the lower left-hand corner, "Paid by check November 28, 1951."

And your Honor will take judicial notice that in order to have a tax bill issued in the name of Russell Sidebotham there had to be a deed on record on the first Monday in March of 1951.

The Court: Let it be admitted and marked next in order.

The Clerk: Defendant's Exhibit K admitted and filed in evidence.

(Whereupon tax bill was received in evidence and marked Defendant's Exhibit K.)

Mr. Trowbridge: Next I have a list of entries to the safe deposit box in the American Trust Company certified by an assistant cashier, brought here by Mr. Byrne, who was on the witness stand. I am only asking that the entries for May 22, 1945, to and including March 13, 1951, be considered in evidence, because the first part of it, the first half of the first page relates to the City Safe Deposit Company box, [204] which we have objected to as being hearsay and not having been authenticated by anybody. So we will only ask that the part which has to do with Box A1917 of the American Trust Company be introduced.

Mr. Ruiz: If the Court please, I object to its introduction unless the entire complementary details of that long document are admitted as well.

The Court: They are all on it?

Mr. Ruiz: If any part of it is admissible for

any specific purpose—going in and out of the box doesn't indicate anything. If any part of it is admissible, the entire matter should go in.

Mr. Trowbridge: This exhibit is as to two separate boxes and two separate banks. We have heretofore objected to anything going in about the City Safe Deposit box, and we would certainly be stultifying ourselves if we offered it now. We are going to move to strike out the two cards of the predecessor institution, and I wish now——

The Court: Wasn't that taken over by the American Trust?

Mr. Trowbridge: It was taken over eventually.

The Court: When?

Mr. Trowbridge: Some time around 1943 or '42; somewhere around there. I don't know exactly. He didn't testify exactly as to when. [205]

The Court: What objection have you to having the whole document in?

Mr. Trowbridge: As long as we are not bound by the top part of it, I don't care; but we are not offering the top part of this record because we think it is hearsay and we don't think it should go in as against us. If he wants to put in, it can go in over our objection, but we certainly wouldn't offer it.

The Court: Very well. Let it be admitted and marked next in order.

The Clerk: Defendant's Exhibit L admitted and filed in evidence.

(Whereupon safe deposit box record was re-

ceived in evidence and marked Defendant's Exhibit L.)

Mr. Trowbridge: Mr. Monell, will you take the stand, please?

There is a matter that comes under the heading of judicial notice. The San Francisco telephone directories issued by the Pacific Telephone & Telegraph Company in February, 1949—no, I am going to start at the other end—in May, 1945; in August—or in November, 1946; in August, 1947; February, 1949, and August, 1950, as appear in the reference library in the City Hall, shows the name of Ruth M. Ramsey at 10 Rossi Avenue, appears in all of those books. That name and address. I offer that. That is a matter that the [206] Court can take judicial notice of because there are directories that are on file in the Public Library.

The Court: Subject to any correction there may be.

Mr. Ruiz: I don't think it is material. I object to it on the ground that it is immaterial, any more than the name of somebody by the name of Smith may appear in a directory. The fact that Ramsey—

The Court: Who is Ramsey? Identify him.

The Clerk: Ruth M. Ramsey appeared in evidence this morning with the same address that Mr. Sidebotham has.

The Court: The investigator?

Mr. Trowbridge: I think there was—I don't know whether it was a stipulation of Mr. Ruiz that

he asked me for; it was just before the noon recess and I think it was brought up that Mr. Sidebotham lived at the house of Ruth M. Ramsey. These bills shows that, the tax bill, water company, gas company and the certificate of registration shows the same thing, that Mr. Sidebotham's address from 1942 on was 10 Rossi Avenue. I just want to show that there was a telephone there. It goes to the question of laches. It shows how easy it would have been to find Mr. Sidebotham if anybody wanted to look for him.

Mr. Ruiz: By calling another woman?

Mr. Trowbridge: The Court can take judicial notice of that or not. I mean, it is in the record. I am just calling [207] it to the Court's attention. The Court doesn't have to take judicial notice of it if it doesn't want to.

Now I will call Mr. Monell to the stand, please.

THEODORE M. MONELL

called as a witness on behalf of the defendant;
sworn.

Mr. Trowbridge: This goes also to judicial notice, but I thought I had better put it in through Mr. Monell.

The Clerk: State your name, your address and your occupation to the Court.

A. Theodore M. Monell, 1019 Mills Building. I am a lawyer.

(Testimony of Theodore M. Monell.)

Direct Examination

By Mr. Trowbridge:

Q. You are a lawyer admitted to practice in all the courts of the State of California, including the United States District Court for the Northern District of California? A. That is correct.

Q. And how long have you been practicing?

A. 34 years.

Q. Mostly in San Francisco?

A. San Francisco mostly, yes.

Q. Do you specialize in any particular branch of the law?

A. Real estate and corporation law.

Q. What do you know about a newspaper issued in San Francisco by the name of Edwards' Abstract?

A. That is a newspaper in which is published all of the [208] transaction reflected in the Recorder's office—transfers of property, encumbrances of property, and any matters which are recorded, generally referred to in the newspaper trade as a *breviat*.

Q. How many times a week is that published?

A. That is issued every day excepting holidays when the Recorder's office isn't open.

Q. How about Saturdays?

A. The Recorder's office not being open on Saturdays, it is not published.

Q. Who are the subscribers to this paper mostly?

Mr. Ruiz: Just a moment, please. I think, your Honor, the best evidence with respect to circulation and what this paper does and so on would be somebody from the office of the newspaper.

The Court: It may be that he knows. I don't know.

Mr. Ruiz: I don't know, either.

The Court: Very well. We will find out. You cross-examine him. It goes to the weight of the testimony.

Q. (By Mr. Trowbridge): Can you answer that question?

The Witness: What was the question?

Mr. Trowbridge: Will you read the question, please?

(Question read.)

A. In general, the real estate brokerage offices in San Francisco, at least the larger ones, are subscribers. [209]

Mr. Trowbridge: That is all.

Mr. Ruiz: No cross-examination.

The Court: Step down.

Mr. Monell: If the Court please, before the defendants rest, we think at this time we should exercise the right which the Court accorded to us of moving to strike certain testimony from the record.

Mr. Trowbridge: May it be understood that these motions are made also on behalf of the administrator?

The Court: May I inquire at this time, is the transcript going to be written up?

Mr. Monell: We don't know at the present time, your Honor.

The Court: All right.

Mr. Monell: We hope not.

We first move to strike out the testimony with reference to Exhibit 6, which is in the testimony of Mr. Daniel J. Byrne, and this testimony was admitted subject to a motion to strike by your Honor—the bank record relative to Box 1861 which was issued by the Security Safe Deposit Company in January 9, 1943, and there was no showing on the part of Mr. Byrne of any familiarity or knowledge with reference to the particular items therein set forth. And the same applies with reference to Exhibit 7, at least insofar as it refers to matters happening before the surrender of the box on [210] May 21, 1945, which was then to a Savings Union office. The original renting of the box was in April 24, 1944. At the time it was the property of the City Safe Deposit Company and it is our position, if the Court please, that that is not substantiated or authenticated properly to be introduced in evidence, and it was admitted subject to being connected up.

Would you like these matters to be taken up and disposed of individually or——

The Court: Do you wish to meet these as we go along, or do you wish to wait until he concludes?

Mr. Ruiz: I will wait until he concludes.

The Court: Very well.

Mr. Monell: Also the testimony of Mr. Fontes, and that was Exhibit 12, which was a typewritten

copy of an excerpt from a portion of an exhibit which was attached to a petition for instructions, if the Court will remember. He testified that he recognized it as being something connected with one of those government returns, and it was admitted, apparently, for two purposes: One, to prove that no tax return was filed in 1946, '47, '48, '49 and '50, and the amount of the total taxes and penalties being \$149,639.38. It is our position that this typewritten document is also not authenticated. It was attached to, as I recall, the claim of the government. No, this was attached to a letter from the Dolge firm of accountants who had made some investigation and obviously it [211] would be hearsay twice removed of that firm. It was based upon a report and examination by them of a government record and it would not be admissible here because it was not properly authenticated. And furthermore, it is not verified; there is no statement from which it could be determined who was the author of the statement and it serves to prove nothing, and even if filed as a claim against the estate, it would be no more than any other complaint on file in this court or any other court. The facts of the complaint are not deemed to be true; they are subject to proof, and this claim is admittedly in dispute between the estate and the claimant. That disposes of Exhibit 12—and also of the testimony of Mr. Fontes with reference to the inheritance taxes which was not introduced in evidence, but Mr. Ruiz felt that he had had enough of the material from the report orally read by Mr. Fontes in which he

showed that the estate consisted of \$149,000 and that the claims against the estate were \$189,000, so that there would be no federal estate tax due. We object to any testimony with reference to the federal estate tax or to the federal estate tax return for the reason that that was prepared by the domiciliary administrator and is not binding upon any party to this action. We had nothing to do with the preparation of it. And the information therein would also be hearsay, because so far as the material selected from the local estate is concerned, [212] it would be based upon the inventory here, and therefore hearsay; and the inventory is part of the record and therefore it is not necessary to introduce the testimony of Mr. Fontes, and it is improper to introduce the testimony of Mr. Fontes as to the contents of that federal estate tax return. When the court, of course, as I said before, admitted that testimony also specifically subject to our right to move to strike it out if it were not properly connected. This motion we at this time are making.

Then Mr. Krout also testified that certain reports were made to him as a partner of Krout & Schneider and this testimony was admitted subject to a motion to strike.

It may be that counsel will admit that that should go out because it is of no importance to him inasmuch as the only thing that he wanted to establish was our stipulation that Mr. Sidebotham, the decedent, was busy all during the years 1935 to 1946.

We will ask that all of the matters referred to be stricken from the record on the basis that they

are incompetent, irrelevant and immaterial, not properly authenticated, hearsay, and not binding on any of the defendants in this case.

Mr. Ruiz: It is my suggestion, if the Court please, that the motions to strike interposed by both defendants and the Court's ruling thereon be deferred over to the conclusion of [213] the summation. And I am saying that in the interests of time and continuity. I have prepared a summation at this time where I am going to specifically handle in proper order the points raised at this time, and I think it would be better to do it that way instead of extracting out of place.

The Court: Are you prepared to go on now with them?

Mr. Ruiz: Yes, your Honor.

The Court: Proceed.

(Thereupon, after argument of counsel for the respective parties, the case was submitted for decision.)

CERTIFICATE OF REPORTER

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 214 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ JOSEPH F. SWEENEY.

[Endorsed]: Filed May 4, 1956. [214]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellants:

Excerpt From Docket Entries.

Transcript on Removal From Superior Court in and for the City and County of San Francisco: Petition for Removal; Copies of Original Complaint First Amendment to Complaint and Summons.

Bond on Removal.

Second Amended Complaint.

Third Amended Complaint.

First Amendment to Third Amended Complaint.

Answer of W. A. Robison, Administrator, to Third Amended Complaint.

Answer of Robert and James Sidebotham to Third Amended Complaint.

Amendment to Answer of Defendants.

Amendment to Answer of W. A. Robison, Administrator, and Robert and James Sidebotham.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law.

Judgment.

Petition of Public Administrator for Allowance of Expenses, etc.

Order Denying Petition for Allowance of Expenses, etc.

Notice of Appeal From Judgment.

Notice of Appeal From Order Denying Allowance of Expenses, etc.

Appeal Bond on Judgment.

Appeal Bond on Order.

Appellants' Designation of Record on Appeal.

Reporter's Transcript of Proceedings.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K and L.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 4th day of May, 1956.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ MARGARET BLAIR,
Deputy Clerk.

[Endorsed]: No. 15,123. United States Court of Appeals for the Ninth Circuit. W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, and Robert Sidebotham and James Sidebotham, Appellants, vs. Helene Marceau Sidebotham, Appellee. W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, and Frank J. Fontes and Delger Trowbridge, His Attorneys, Appellants, vs. Helene Marceau Sidebotham, Appellee. Transcript of Record. Appeals From the United States District Court for the Northern District of California, Southern Division.

Filed May 4, 1956.

Docketed May 8, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,123

W. A. ROBISON, Administrator of the Estate of
Robert Sidebotham, Deceased, et al.,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Respondent.

STATEMENT OF POINTS UPON APPEAL

The points upon which appellant W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, intends to rely on this appeal are as follows:

I.

Respondent did not prove and the Court erroneously found in its findings of fact that the property in the possession of and owned by Robert Sidebotham at the time of his death was the same property which he owned when plaintiff and he were divorced in the State of Nevada on November 14, 1946.

II.

Respondent did not prove and the Court erroneously found in its findings of fact that the property in the possession of and owned by Robert Sidebotham at the time of his death was the same property which he owned when plaintiff and he were

divorced in the State of Wyoming on November 2, 1940.

III.

That the Honorable District Court herein erred in finding that the decree of the First Judicial District Court of the State of Wyoming, County of Albany, dated November 2, 1940, was void and subject to collateral attack.

IV.

That the Honorable District Court herein erred in not finding and adjudging that respondent's alleged cause of action was barred under the rule of res adjudicata by the decree of the Superior Court of the State of California in and for the City and County of San Francisco, determining heirship in the matter of the Estate of Robert Russell Sidebotham, Deceased, filed therein on December 14, 1953.

V.

The Honorable District Court herein erred in not finding as a fact and adjudging that respondent's alleged cause of action was barred by the provisions of the California Statute of Limitations.

VI.

That the Honorable District Court herein erred in not finding as a fact and adjudging that respondent's alleged cause of action was barred by the doctrine of laches.

VII.

That the Honorable District Court herein erred in not finding as a fact and adjudging that respondent's

ent's alleged cause of action was barred under the rule of *res adjudicata* by the decree of the First Judicial District of the State of Nevada, in and for the County of Ormsby, filed on November 14, 1946, in an action then pending between Madeline Sidebotham (who is the plaintiff in the above-entitled action) as plaintiff against Robert Russell Sidebotham as defendant.

VIII.

That the Honorable District Court herein erred in not finding as a fact and adjudging that respondent's alleged cause of action was barred by the doctrine of equitable estoppel on the grounds set forth in the fifth affirmative defense in this appellant's answer to plaintiff's third amended complaint.

IX.

That the Honorable District Court herein erred in admitting in evidence over the objections of this appellant the following improper evidence:

1. All of the testimony of Mr. Daniel J. Byrne found in the Reporter's Transcript on page 97, line 5, to page 98, line 9; also on page 98, line 20, to page 100, line 4; also on page 102, line 17, to page 104, line 1; and also on page 104, line 25, to page 106, line 22; all on the ground that all of said testimony was hearsay and was not the best evidence.

2. Plaintiff's Exhibit No. 6 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

3. Plaintiff's Exhibit No. 7 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

4. Plaintiff's Exhibit No. 8 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

5. Plaintiff's Exhibit No. 9 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

6. All of the testimony of Frank J. Fontes found in the Reporter's Transcript on page 136, line 13, to page 146, line 25; also on page 147, line 21, to page 153, line 19; and also on page 157, line 11, to page 159, line 14; on the ground that said evidence was hearsay and not the best evidence.

7. Plaintiff's Exhibit No. 12 on the ground that said evidence was hearsay and not the best evidence and that a proper foundation was not laid for it.

Dated this 15th day of June, 1956.

/s/ DELGER TROWBRIDGE,

/s/ FRANK J. FONTES,

Attorneys for Appellant W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 16, 1956.

No. 15123

United States
Court of Appeals
for the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of
ROBERT SIDEBOTHAM, Deceased, et al.,
Appellants,
vs.

HELENE MARCEAU SIDEBOTHAM,
Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILE

OCT - 2 1953

No. 15123

United States
Court of Appeals
for the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of
ROBERT SIDEBOTHAM, Deceased, et al.,
Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,
Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

NAMES AND ADDRESSES OF COUNSEL

THEODORE M. MONELL,

1085 Mills Bldg.,
San Francisco, Calif.;

DELGER TROWBRIDGE,

Box 277,
San Rafael, Calif.,

For the Appellants.

MANUEL RUIZ, JR.,

704 So. Spring St.,
Los Angeles, Calif.,

For the Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 32531

HELENE MARCEAU SIDEBOTHAM,

Plaintiff,

vs.

W. A. ROBISON, Administrator of the Estate of
Robert Sidebotham, Deceased, et al.,

Defendants.

Before: Hon. Michael J. Roche, Judge.

PROCEEDINGS ON SETTLEMENT
OF FINDINGS

Appearances:

For the Plaintiff:

MANUEL RUIZ, JR., ESQ.

For the Defendant:

DELGER TROWBRIDGE and
FRANK J. FONTES, ESQ.

* * *

Monday, February 27, 1956—3:00 P.M.

Mr. Trowbridge: May it please the Court, at this time I would like to file a petition of the Public Administrator and his attorneys for allowance of expenses of defense, including attorneys' fees, and I have delivered a copy to Mr. Ruiz, and I

would like the record to show that I have so delivered a copy to Mr. Ruiz, that he waives notice of time of hearing and consents the matter be heard now.

Mr. Ruiz: That is correct.

Mr. Trowbridge: We have this petition verified, five pages long, and would your Honor like me to summarize it or read it?

The Court: Summarize it.

Mr. Trowbridge: All right, your Honor.

This petition shows that this case was started on October 10, 1952, by the filing of a complaint in San Francisco in the Superior Court, City and County of San Francisco, removed to this court early the following year, February of 1953, because of the fact that the heirs at law were non-residents. The services performed have to do with the settling of the pleadings. First there are three amended complaints. There was an amendment to the complaint, so we had, in effect, four different complaints to analyze, and we filed motions to dismiss as to two of the complaints, and [39*] the motions to dismiss were granted in one case by Judge Murphy.

Then there was a further amended complaint filed, and then Judge Carter granted the second motion to dismiss.

Then there was an appeal taken by the plaintiff to the United States Court of Appeals, as your Honor knows, and we wrote a brief and argued the case.

Then there was a petition for rehearing after the decision against us. Then we had to file a six-page answer to the, I think it was the third amended complaint, and then another amended complaint filed, and we had to file another six-page answer.

Then we took the deposition of the plaintiff in Los Angeles last February 18, and we also propounded interrogatories and had other matters to do. There was a great deal of library work in this case because, as your Honor will remember, we raised the defense of the proceeding in the Superior Court in San Francisco, petition to determine heirship. Then we briefed the matter of the Nevada claim, the effect of the Nevada complaint, the admission in it. We briefed the effect of the Wyoming decree, we briefed the question of tracing assets, we briefed the question of laches and state of limitations, all of which took days and days of work in the library.

Then we had a trial of four days last fall, October 24, [40] '5, '6 and '7, with an oral argument at the end of the trial, and there was a 22-page brief that was prepared by us.

Then we had to consider your Honor's opinion and we proposed amendments to the proposed findings of fact and conclusions of law. And we have also included certain expenses of the administrator, out-of-pocket expenses, which are as follows: four items—expenses of printing brief on appeal, \$115.14; expense of printing petition for rehearing, \$76.52; the deposition in Los Angeles cost \$98.64; and my own traveling expense was \$49.15.

Then portions of the transcript on the trial before your Honor were written up, and they cost \$92.40.

The petition ends up with a statement that the defense was made in good faith and on reasonable grounds, and we ask for attorneys' fees and expenses that we have listed.

Now, I want to say that I did receive some compensation in the probate court for preliminary work in this case. It was in December of 1954 that I filed a petition in the probate court which covered not only the preliminary work in this case, the early stages of it, but it also covered settling a claim of another woman who claimed a half interest in the estate as a partner.

We had a tax case in the City and County of San Francisco, which we got rid of, and there were many other things, so that the compensation that I got in December of 1954 only [41] covered a small part of the services rendered in this case.

The Court: You are asking for how much?

Mr. Trowbridge: No specific amount mentioned in the petition, but I think that inasmuch as this is a \$100,000 estate, a half of the estate is involved here, that under the circumstances I would suggest \$7,500 and make an allowance of \$1,500 for the work that we were paid for in the probate court, a net of \$6,000.

Mr. Ruiz: When counsel handed me this at 3 o'clock, your Honor, I called counsel's attention to the fact that an application for attorneys' fees had been made in the probate court covering not only the preliminary work, but the appeal as well. In

other words, we have here about a five-page recital concerning what Mr. Robison did and what Mr. Trowbridge did, including the trip to Los Angeles, which was mentioned on the application before the probate court; almost four pages of the five pages with respect to work done has already been passed upon by the probate court. I don't have the probate file before me, but——

Mr. Trowbridge: If the facts are not correct, as you state, then I will correct them later. I have the proof right here.

Mr. Ruiz: I wish to be corrected on it because I am drawing upon independent memory. If I recall correctly, the appeal was mentioned. [42]

That is from the equitable side of it, and as I think I mentioned before, as a matter of fact, for the purposes of the record, I would like to know at this time how much fees have been granted to counsel and his associate counsel in this action, as well as Mr. Trowbridge in this matter in the probate court. Would counsel care to answer that question?

Mr. Trowbridge: Certainly.

The Court: Total amount.

Mr. Ruiz: Total amounts.

Mr. Trowbridge: Yes. Before I do that I want to call attention to a statement Mr. Ruiz made that this deposition in Los Angeles was included in the probate allowance. It was not, because the petition was in February, February 18 of 1955. That was the date of the deposition, February 18, 1955, and

the order was made by the probate court in December of 1954.

Mr. Ruiz: I believe, did not the application for attorneys' fees mention the fact that a deposition was to be taken?

Mr. Trowbridge: I am not sure.

Mr. Ruiz: I think it did.

Mr. Trowbridge: But anyway the services were performed after December, 1954, with regard to the taking of the deposition. We certainly planned to take it for a long time. [43]

The allowance that was made to me in the probate court in December of 1954 was \$4,400, and as I say, that covered the settlement in the Ramsey case, it covered successfully contesting a personal property tax of the City and County of San Francisco for \$5,000, it covered a lot of the preliminary work in this case of Arthur, W. A. Arthur against the public administrator which involved the entire estate. There they are asking to have the whole estate set aside for constructive fraud. It also covered a lot of work in connection with the income taxes of the federal government in the sum of \$149,000, and for all of that work, including this work that is mentioned here, the preliminary work in this case, including some of the appeal work, as I say, my personal allowance was \$4,400 in the probate court.

Mr. Ruiz: What has been the allowance of Mr. Monell?

Mr. Trowbridge: Mr. Monell received \$3,600, but he is not petitioning here, because he represents

the heirs, didn't represent the public administrator, and he is not petitioning for any fee.

Mr. Ruiz: How much was allowed Mr. Jepsen, the other attorney?

Mr. Trowbridge: \$2,000, and he had nothing to do with this case at all.

Mr. Ruiz: And how much has been allowed the administrator? [44]

Mr. Trowbridge: I am not sure. The administrator, and Mr. Fontes as such, I think were—I don't think anything has been allowed to them as such. There was an early allowance on account of extraordinary fees of fifteen—not extraordinary, on account of ordinary compensation, there was an early allowance of about \$1,500 to the attorneys, including Mr. Fontes' predecessor. That was ordinary probate services, and I don't think anything has been allowed to either of the administrators as such.

Mr. Ruiz: There was one more question, if I may be permitted, if the Court please.

Is there any reason why this petition cannot be filed before the probate court as a matter of law?

Mr. Trowbridge: Well, as I explained to your Honor this morning, it seems to me only fair that if this lady is going to take half of the assets of the estate, that her half of the assets should bear the expenses, all the expenses of the litigation in this court, and I don't think it's fair for any of the legal expenses of this litigation, which concerns her half of the estate, to be saddled on the other half of the estate, which has nothing to do with this litigation.

Mr. Ruiz: Now, with the way the matter has been presented to the Court in respect to the judgment, the administrator has been asked to pay in due course of [45] administration. I think that protects any qualms that counsel may have, No. 1; No. 2, I think the record is clear that compensation has been granted for services rendered and that there shouldn't be any duplicity. No. 3, in any event this court does not have jurisdiction with respect to the pleadings, with respect to anything that has been presented in the trial of the case to grant attorneys' fees. No. 4, the California law is clear that attorneys' fees can only be granted when there is some advantage that the administrator has procured on behalf of the estate, and in this particular case there is no advantage. Had the administrator succeeded in this case, the reverse would have been true. For that reason, the plaintiff, or respondent in this motion, opposes the same.

Mr. Trowbridge: I would like to answer the last point first, that is, the Court hasn't any power to grant any compensation because of the fact that the public administrator wasn't successful in this proceeding. We had exactly the same situation in the case of Egert versus Pacific States Saving and Loan. In that case the defense was presented by the beneficiary instead of by the Building and Loan Commissioner because he was on both sides of the fence, and the position that was presented on behalf of the Building and Loan Commissioner was unsuccessful in the defense of this action by the depositors of Fidelity Savings and Loan. [46]

Also, the court in that case passed on that very question, and in deciding that the Building and Loan Commissioner—well, it wasn't the Building and Loan Commissioner, but anyway, the attorneys who did represent the defense in that case, which the Building and Loan Commissioner would normally have presented, they held that in that case, since there had to be a defense, the Building and Loan Commissioner had the duty of presenting the defense if he were not disqualified; that that being his duty, that therefore he should have a right to have his counsel compensated.

They cited the case of Dingwell versus Seymour, an old California case, to the same effect where there was an unsuccessful defense made. The court said—I think it was the court, or else it was in the brief, that if the custodian or a trustee was brought into court involuntarily and cannot be sure of being reimbursed for the expenses of his counsel, he wouldn't come in at all, because he couldn't afford to make a defense if he wasn't sure he was going to be compensated.

So in this case here, this is a case in equity that is found before the court, and it isn't a question whether the counsel for the public administrator have benefitted the fund, the public administrator has carried out his duty of trying to protect the fund, which is in his hands. It is his [47] duty to resist all assault in a court in a reasonable way on good grounds. That being his duty, he is entitled to a compensation for his attorneys, whom he selected to perform his duty for him in that regard.

Mr. Ruiz: In answer to that, the law of receivership, your Honor, in the State of California with respect to conservation of assets is to be distinguished from the law with respect to probate procedure. If the Court will read that case, the Court will see immediately there is a clear differentiation.

Mr. Trowbridge: Well, that is not so, I am sorry to say that bluntly, but there is a case by Judge Kaufman within the last year involving administrators, and the point is just the same, the public administrator is nothing but a custodian and receiver.

The Court: You have the advance sheet on that?

Mr. Trowbridge: The case that I have reference to was about a year ago. I can furnish the citation of the case by Judge Kaufman involving a probate proceeding, involving the administrator, yes. It would take a minute or two to find it. I don't have it with me, I don't know whether I have it handy or not, but it is named something like the Estate of Arota, something like that, but I know I read it recently.

The Court: I am prepared to sign your findings and judgment. That will then go back to the probate court, will [48] it not?

M. Ruiz: Yes, your Honor.

The Court: The probate court has a full opportunity to fix the fee?

Mr. Ruiz: Yes, your Honor.

The Court: In this case as well as the other cases?

Mr. Ruiz: Yes, that is correct.

The Court: I think that's the regular procedure, isn't that true?

Mr. Trowbridge: Well, I don't think in this particular case, your Honor, because as I say, it is going to penalize the other half of the estate for the services rendered here, and your Honor has this fund before him in this court, and the public administrator has been brought into this litigation by service of summons without desire to come in, but he has come in, of course, as is his duty, having been served. But I think that being so, this fund of this court should bear the expenses of the litigation pertaining to this fund.

The Court: Maybe the probate court will so determine.

Mr. Trowbridge: I don't think the probate court would have any jurisdiction, your Honor, to take any money out of Mrs. Sidebotham's half here.

The Court: Why not?

Mr. Trowbridge: Unless your judgment makes it clear to that effect. If your judgment has a paragraph in it that the [49] public administrator and the probate court may make an order affecting this half——

The Court: Any order that I may make will not interfere with your presenting, through the public administrator, the work and labor performed here, if I follow the law and understand it. So that I may be on safe grounds on that score, I would like to get you on the record if that isn't the law.

Mr. Ruiz: Yes, that is the law, your Honor.

The Court: In the event this is approved, this half of the property can be assessed for the proper costs.

Mr. Ruiz: That depends upon the arguments that are submitted by my worthy opponent, because of this fact: This judgment is going to be subject to interpretation. This judgment sets forth and is memorializing an obligation between the decedent and his former wife. The fact that it is a judgment only means it is again susceptible to further interpretation. This judgment will be susceptible to interpretation not only with respect to the matter at hand, but with respect to the matter to which reference has been made, with respect to the trust, the estate constituting trust property of some other people, whether the judgment in this case does or does not cut that off. This judgment will be susceptible to interpretation with respect to the United States Internal Revenue. We cannot project ourselves into [50] the future.

As I said before, this is ordinary. Oftentimes judgments are procured and then other judgments are procured, and it depends upon the ability and astuteness of counsel with respect to the interpretation and the law.

It is my interpretation, sir, of the law that the probate court at the present time has within its jurisdiction all of the corpus of the estate, and in due time will interpret the law and that it may interpret to the effect that Mrs. Sidebotham, out of her proportion, may be susceptible to a payment of attorneys' fees.

The Court: That would be my view.

Mr. Ruiz: And fees for the administrator.

The Court: So that you are not prejudiced by this motion, I am prepared to deny your motion without prejudice so that you may renew and have your day in court.

Mr. Trowbridge: The thing that we are con- about, your Honor, is that we may be faced here- after with an argument, not necessarily by Mr. Ruiz, but by somebody else, maybe the federal gov- ernment or some other claimant, that since your Honor has held that the property here in the estate was held as tenants in common by Mr. and Mrs. Sidebotham as far back as 1946, that the probate court has no right to deduct anything from her half interest for expenses of this litigation, including at- torneys' fees, under the analogy of an express [51] trust. We will say that the public administrator is holding the property, half of the estate under an express trust for the benefit of Mrs. Sidebotham and that that express trust goes way back to 1946.

Now, if that argument is made by Mr. Ruiz or anybody else, it might be held by the probate court, or some other court, that the probate court has no jurisdiction to take anything out of her half inter- est. That's what we are afraid of. But if your Honor indicates, as you are now indicating, that it's your opinion and your intention that eventu- ally whatever goes to Mrs. Sidebotham is to bear a fair proportion of the expenses of defending this case by the public administrator, including attor-

neys' fees, that certainly will be very helpful, if your Honor indicates that is your opinion and intention.

The Court: I think to stay within the law, and I could be mistaken in this, when this judgment is presented to the probate court I think they are legally in a position to recognize that you came into this court and that you haven't been compensated for the work and labor here. I think they are the ones to make the determination in fixing your fees.

Mr. Trowbridge: Well, that may be true as to fixing the fee, but equally important is the question which half of the estate will bear the fee, whether it should be Mrs. Sidebotham's half of the estate or—— [52]

The Court: It is for them to determine, the probate court to determine.

Mr. Trowbridge: We may end up by having further litigation in the form of a declaratory relief action or petition for instructions, or something of that sort, to find out who is going to bear the burden of the expense of the litigation.

The Court: Well, your motion will have to be denied without prejudice, and I am prepared to sign the findings and the judgment.

Mr. Trowbridge: May it please the Court, will there by a formal minute order denying attorneys' fees without prejudice?

The Court: Yes, sir.

Mr. Trowbridge: Thank you.

The Court: I did the best I could under difficul-

ties, gentlemen. Go forward, and I hope and trust right will finally prevail. I'm glad both of you are in good humor.

[Endorsed]: Filed August 9, 1956. [53]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplement to the record on appeal, as requested by counsel for the appellant:

Reporter's transcript of proceedings of February 27, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of August, 1956.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15123. In the United States Court of Appeals for the Ninth Circuit. W. A. Robison, Administrator of the Estate of Robert Sidebotham, Deceased, et al., Appellants, vs. Helene Marceau Sidebotham, Appellee. Supplemental Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 10, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15,123

IN THE

United States Court of Appeals
For the Ninth Circuit

W. A. ROBISON, Administrator of the
Estate of Robert Sidebotham, De-
ceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

VS.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLANTS' BRIEF.

FRANK J. FONTES,

City Hall, San Francisco 2, California,

DELGER TROWBRIDGE,

Box 277, San Rafael, California,

Attorneys for Appellant

W. A. Robison, as

Administrator of the Estate of

Robert Sidebotham, Deceased.

THEODORE M. MONELL,

Mills Building, San Francisco 4, California,

Attorney for Appellants

Robert Sidebotham and

James Sidebotham.

FILE

SEP 27 1956

PAUL P. O'BRIEN, CL

Subject Index

	Page
Argument	4
The facts	4
Laches	5
Obvious falsity and inherent improbability of plaintiff's case	14
Tracing of assets	17
Obvious falsity and inherent improbability of plaintiff's case	18
The law	22
I. Effect of opinion on prior appeal	22
II. The appellee was required to prove that the property on hand at the date of death was the same property owned by Mr. Sidebotham when his marriage was dis- solved	23
III. The decree establishing heirship in the matter of the estate of Robert Russell Sidebotham in the San Fran- cisco Superior Court, filed on December 14, 1953, is res judicata of the main issues in this case	28
IV. The District Court erred in not giving full faith and credit to the Wyoming decree	34
V. Helene Mareeau Sidebotham has been guilty of in- equitable laches and delay and the District Court erred in not holding that her action was barred both by laches and by the doctrine of equitable estoppel	37
Miscellaneous rulings on evidence complained of	42
Conclusion	49

Table of Authorities Cited

Cases	Pages
American Trust Co. v. Dixon, 26 C.A. 2d 426, 78 P. 2d 449	49
Blatz Brewing Co. v. Collins, 88 C.A. 2d 438, 199 P. 2d 34	22
Citron v. Fields, 30 C.A. 2d 51, 85 P. 2d 534	20
Champion v. Wood, 79 Cal. 17, 21 Pac. 534	6, 37, 39, 40, 42
Clarke v. Shoshoni Lumber Co., 224 Pac. 845	35
Corely v. Hennessey, 58 C.A. 2d 225	18
Davis v. Johnston, 144 F. 2d 862 (C.C.A. 9th, 1944), certiorari denied by Supreme Court, 323 U.S. 789	36
DeParcy v. Liggett & Myers, 81 F. 2d 777, certiorari denied in 298 U.S. 689	22
Dolinar v. Pedoni, 63 C.A. 2d 169	12
Elder v. M'Claskey, 70 Fed. 529 (C.C.A., Sixth Circuit, 1895)	29
Estate of Anderson, 142 A.C.A. 453, 298 P. 2d 105, decided June, 1956	27
Estate of Brady, 171 Cal. 1, 151 Pac. 275	27
Estate of Doran, 138 A.C.A. 618, 292 P. 2d 655	27
Estate of Harris, 9 C. 2d 649, 72 P. 2d 873	27
Estate of Rattray, 13 C. 2d 702, 91 P. 2d 1042	27
Estate of Riccomi, 185 Cal. 458, 197 Pac. 97	29
Estate of Simonton, 183 Cal. 53, 190 Pac. 442	23, 27
Estate of Teed, 112 C.A. 2d 638, 247 P. 2d 54	21
Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919	29
Guardianship of Sturges, 30 C.A. 2d 477, 86 P. 2d 905	21
Herbert v. Lankershim, 9 C. 2d 409, 71 P. 2d 220	20
Hoagland v. Hoagland, 57 P. 20 (Utah)	36
Hume v. Ricketts, 240 P. 2d 881	36
In re Adams' Estate, 132 C.A. 2d 190, 282 P. 2d 190	24
In re Clary, 112 Cal. 292, 44 Pac. 569	32
In re De Leon, 102 Cal. 537, 36 Pac. 864	32

TABLE OF AUTHORITIES CITED

iii

	Pages
In re Hanson's Estate, 126 C.A. 2d 71, 271 P. 2d 563	27
Jones Truck Co. v. Superior Oil, 234 P. 2d 802	36
Laurel Hill Cemetery v. All Persons, 69 C.A. 2d 190, 158 P. 2d 759	29
Lee Way Motor Freight v. True, 165 F. 2d 38 (C.C.A. 10)	21
Massachusetts Mutual v. Pistolesi, 160 F. 2d 668 (C.C.A. 9th)	49
Medeiros v. Cotta, 130 C.A. 2d 740, 279 P. 2d 814	30
Medeiros v. Medeiros, 138 A.C.A. 230, 291 P. 2d 142	31
Medeiros v. Silva, 132 C.A. 2d 771, 283 P. 2d 50	31
Moore Estate, 65 Cal. App. 29, 223 P. 73	27
Pasadena Laboratories v. U. S. A., 169 F. 2d 375	12
Pickens v. Marriam, 274 Fed. 1 (C.C.A. 9)	27
Schlyen v. Schlyen, 43 Cal. 2d 361, 273 P. 2d 897	28, 30, 32
Thompson's Estate, 101 Cal. 349, 35 Pac. 991	32
Simons v. Bedell, 122 Cal. 341, 55 Pac. 3	31
U. S. v. Thornburgh, 111 F. 2d 278 (C.C.A. 8)	21
Wells Guardianship, 140 Cal. 349, 73 Pac. 1065	29

Statutes

Code of Civil Procedure, Section 1963, subdivision 40	23
Wyoming Compiled Statutes of 1945, Section 3-5406	36

Texts

4 Cal. Jur. 2d 594, Section 688	22
4 Cal. Jur. 2d 605	18
13 Cal. Jur. 2d 591, Section 82, Courts	33
21 C.J.S. 132, Section 85, Courts	30
49 C.J.S. 849, Section 427, Judgments	35

No. 15,123

IN THE

United States Court of Appeals
For the Ninth Circuit

W. A. ROBISON, Administrator of the
Estate of Robert Sidebotham, De-
ceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

VS.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLANTS' BRIEF.

There are two appeals in this case. One from the judgment and one from an order regarding expenses of defense. The appeal from the order re expenses is separately briefed. The main case reached the District Court on a petition for removal of the cause from the California Superior Court to the District Court by reason of the diversity of citizenship of the parties.

The other appeal, based on the same record, is from an order denying appellant W. A. Robison as administrator of an estate an allowance out of the fund before the Court for his expenses in defending said action as administrator.

The nature of the case is a claim by the plaintiff, the divorced wife of the decedent, Robert Sidebotham, that there was property in existence at the time of the death of Robert Sidebotham, deceased, on December 21, 1951, which was community property of the parties when they were divorced in Nevada on November 14, 1946 and which the Court then failed to divide. If the divorced wife's claim is correct (which we deny), she would have an undivided half interest as surviving tenant in common in all the property which he owned at the time of his divorce and which his divorced wife could trace into his estate.

The main questions involved on this appeal are four in number, and are succinctly stated as follows:

1. Whether the decree of the Superior Court of the State of California for San Francisco County filed December 14, 1953, determining that the appellee herein had no rights to any of the assets in the estate of Robert Sidebotham, deceased, operated as a complete bar to all of appellee's rights claimed in this action under the doctrine of *res adjudicata*.

2. Whether the appellee divorced wife identified or traced any of the assets owned by Robert Sidebotham, deceased, at the time of his death as being assets which he owned at the time of the divorce in Nevada in 1946 or at the time of the divorce in Wyoming in 1940?

3. Whether appellee's alleged cause of action is barred under the provisions of the California Statute of Limitations?

4. Whether appellee's alleged cause of action is barred by the doctrine of laches?

5. Whether appellee's alleged cause of action is barred by the doctrine of estoppel?

6. Whether appellee's alleged cause of action is barred by the Nevada divorce decree filed November 14, 1946 under the doctrine of *res adjudicata*?

The specifications of error relied upon are as follows:

1. The District Court erroneously found that all the property owned by Robert Sidebotham, deceased, at the time of his death on December 21, 1951 was property which he owned at the time of the Nevada divorce in 1946.

2. The District Court erroneously found that the property owned by Robert Sidebotham, deceased, at the time of his death on December 21, 1951 was property which he owned on November 2, 1940, when he divorced the plaintiff in the State of Wyoming.

3. That the District Court erroneously found that the divorce decree of the State of Wyoming dated November 2, 1940, dissolving appellee's marriage with Robert Sidebotham, was invalid and subject to collateral attack.

4. That the District Court erred in finding that appellee's cause of action was not barred by the rule of *res adjudicata*, which rule should have been applied by reason of the decree of the Probate Court of the State of California in a proceeding determining heirship in the matter of the estate of Robert

Russell Sidebotham, deceased, filed therein on December 14, 1953.

5. The District Court erred in not finding that appellee's cause of action was barred by the provisions of the California Statute of Limitations.

6. The District Court erred in not finding that the appellee's cause of action was barred by the doctrine of laches.

7. The District Court erred in not finding that appellee's cause of action was barred under the rule of *res adjudicata*, which rule should be applied by reason of the terms of the divorce decree in the State of Nevada filed on November 14, 1946, by which respondent divorced Robert Russell Sidebotham, deceased.

8. The District Court erred in not finding that appellee's cause of action was barred by the doctrine of equitable estoppel.

9. The District Court erred in admitting various pieces of testimony in evidence. These erroneous rulings and the objections thereto are set forth in detail under the heading "MISCELLANEOUS RULINGS ON EVIDENCE COMPLAINED OF" on pages 42-48 of this brief.

ARGUMENT.

THE FACTS.

According to the third amended complaint (personally sworn to by the appellee) she was married to

Mr. Sidebotham on January 1, 1927, in New York, which admittedly was a common law marriage. (Tr. 88.) At the trial appellee for some mysterious reason withdrew this allegation and fell back on a Tijuana, Mexico, civil marriage, which took place before a civil officer on May 30, 1928. (Tr. 89.) For some unknown reason appellee strenuously opposed all efforts to go into the New York marriage and in fact positively denied that there had been any such marriage. (Tr. 87-88.) The record shows she travelled all over the United States with him for about a year and a half thereafter being at that period unmarried to him. (Tr. 86-91.)

After the now repudiated New York marriage, respondent testified she went to Boston with Mr. Sidebotham and stayed there with him for about six months. (Tr. 90.) Then about Christmastime of 1927 she went to San Francisco with him (Tr. 90) and after several months there she went to Los Angeles with him (Tr. 90) and eventually went from there to Tijuana, Mexico, to marry him. (Tr. 94.) She remained at Los Angeles and at Arrowhead Lake for several years until about 1935 (Tr. 94) when she and Mr. Sidebotham went to San Francisco together. (Tr. 98.)

LACHES.

In answer to questioning by her counsel she testified that she was "happily married" from 1930 to 1935 (Tr. 94), which was *far from the truth*, as the record shows in many respects without contradiction. These matters may seem at first blush unimportant.

However, they are vitally important on the question of laches and equitable estoppel as is shown by the discussion in the case of *Champion v. Wood*, 79 Cal. 17, 21 P. 534, which could have been written for this case so similar are the facts. We will show the Court by five written statements signed by her how completely false this statement about their marital bliss was.

1. On April 24, 1930, she extorted an agreement from her husband to pay her 10 per cent of his earnings indefinitely and a minimum of \$1,000.00 as balm for assault and battery. See the agreement itself which is attached as an exhibit to her complaint filed against him for separate maintenance in Los Angeles on March 31, 1933. (See Defendants' Exhibit C.)

AGREEMENT

This Agreement made and entered into this 24th day of April, 1930, by and between Robert R. Sidebotham and Madeline Sidebotham, of Los Angeles, California, hereinafter referred to as Robert and Madeline, for and in consideration of the sum of Twenty-five Dollars, (\$25.00) in hand paid and the further consideration of Robert assigning to Madeline one-half of all the moneys due him at this time from the Frank L. Green organization, and the further consideration of receiving ten per cent of all the moneys that may be received from his employment agreement now in force with Lawrence & Company, Madeline hereby agrees, in consideration of the above named consideration, that she will not prosecute or cause to have prosecuted the above referred to Robert for al-

leged assault and battery, or any other criminal acts or alleged criminal acts that she may have, or thinks she has knowledge of.

It is understood that Robert will assist her to collect such moneys as may be due from above referred to Green and in the event that these sums do not total \$1000 between this date and May 15th, 1930, he will pay to the said Madeline the difference between the amounts received by her from the above mentioned consideration to make the full amount to be paid under this agreement \$1000. May 15th, 1930. And that the said Madeline further agrees to relinquish a certain affidavit or statement made by Ruth Cross.

Witness

(Signed) Mrs. A. L. Cloud

(Signed) Madeline Sidebotham

(Signed) Robert R. Sidebotham

2. In her Nevada divorce complaint (Defs' Ex. E) she alleged that "Since on or about June 30, 1931, at Los Angeles, California, the plaintiff and defendant lived separate and apart from each other without cohabitation". Her counsel got her to change this date on re-direct examination to "June 30, 1941", (Tr. 116) forgetting that *at that time she was living by herself in San Francisco*, (Tr. 110-111) whereas, as she testified on cross-examination, she was living in Los Angeles on June 30, 1931. (Tr. 117.) We call attention to another falsehood in the same allegation. She testified that after she went to San Francisco in 1935 she cohabited with him at two of her addresses in San Francisco, the Hansa Hotel and at 380 Union Street.

3. In her sworn separate maintenance complaint in Los Angeles she alleged that she and her husband separated on February 5, 1932, (Defendants' Exhibit C), although in her Nevada sworn complaint she said they separated on June 30, 1931.

4. On March 3, 1932, she wrote the first Mrs. Sidebotham "I am getting divorce from Bob" and that she planned "to establish a settlement". (Defendants' Exhibit D.)

5. On March 31, 1933, she filed a separate maintenance action against her husband in Los Angeles containing many vivid allegations of extreme cruelty covering several years of misconduct. (Defendants' Exhibit C.)

If plaintiff had been shown to have lived a marital life without any discord and in close union with her husband for many years and also that she was wholly ignorant of Court proceedings, property settlements and business affairs, such matters might have some bearing on disregarding the application of the doctrines of *laches and estoppel*.

However, the exact opposite is the case here!

It appears from her sworn complaint filed in a Los Angeles separate maintenance suit on March 31, 1933, (Defendants' Exhibit C) *prepared by her present astute counsel* (Tr. 95) that less than twenty-three (23) months after the Mexican marriage contract her husband struck her many times and threatened to kill her. (Defendants' Exhibit C.) His acts as described by her were of such a criminal nature that he feared she would have him jailed so she succeeded in ex-

March 3rd 1932.

Dear Mrs Sidebottom,

This is quite important
that I should write
you as I am getting
money from Bob - and
I would appreciate very
much your telling me
the amount of money
Bob has to pay
you monthly in accordance

establish a settlement
I will do all I can
to save any publicity
that might cause embarrass-
ment to himself and
family. —

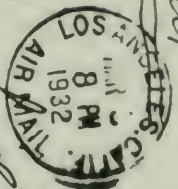
Thanking you in
anticipation I remain —

Respectfully

Mrs V.R. Sidebotham

3122 Durango St.
Los Angeles
Cal —

Air Mail



For R.R. Dickson
~~to Mrs. Mary C. Hayes~~

155 Henry St.
Brooklyn
New York
~~Forwarded to Wallace Graham~~

Please forward

torting a settlement agreement from him. (This agreement was attached as an exhibit to her separate maintenance complaint Defendants' Exhibit C Tr. 95.) Under this remarkable document she agreed not to prosecute her husband criminally and in exchange for this he agreed to pay her \$1,000.00 *and a substantial percentage of his future earnings* from one firm, apparently for an indefinite period of time, and half of his past earnings from another firm. If this is not a bold case of extortion by the respondent we have never heard of one. What else did this innocent (?) inexperienced (?) woman do? She personally wrote a letter to the first Mrs. Sidebotham on March 3, 1932, (less than 22 months after their marriage) and asked what alimony Mr. Sidebotham was paying her, saying she was going to get a divorce from him. (Defendants' Exhibit D, Tr. 97.) She said it was for the purpose of getting a settlement for herself and she promised not to embarrass *Mr. Sidebotham "and family"* by any *publicity*. This was another extortion attempt because she asked for information vital to herself and then impliedly said that if she got the information she would not expose her husband and family. In other words, she said "give me this information *or else*".

In her verified separate maintenance complaint (Defendants' Exhibit C, Tr. 95) respondent also alleged that for *two and a half* years prior thereto (i.e. commencing in September 1930, only *sixteen* months after the Mexican marriage) her husband visited her friends and made derogatory remarks about her; her complaint also alleged that she and her husband sep-

arated on February 5, 1932, and that for one year prior thereto he insisted that she go out alone when she wished to go to a place of interest or amusement; She also swore that he attempted to push her over a cliff on a trip between Los Angeles and Lake Arrowhead, and that in the summer of 1929 (only a year after their marriage) he threw a clock at her and hit her in the head; also that he failed to support her for more than a year prior to filing her complaint. How in the world could she say they were "happily married" when she complained under oath of brutal treatment of her by him for almost *four* years before filing the separate maintenance complaint in 1933, and later she admitted he deserted her completely from 1941 until he died in 1951? (Tr. 110 and 122.)

She tried to gloss over this ridiculous statement by testifying as follows:

"Q. Yesterday you testified that you sued your husband in a suit for separation and you related in your complaint that he treated you cruelly. When did he do that?

A. Only when he was intoxicated." (Tr. 127-128.)

Would she have the Court believe that he was completely intoxicated continuously for almost four years prior to her filing her complaint? Would this account for his almost complete failure to support her between 1932 and 1951? The absurdity of her statement is self-evident. The separate maintenance complaint was *never* dismissed and time marched on with the plaintiff and Mr. Sidebotham living a few years more in

Los Angeles and then moving to San Francisco. The record is very sketchy until 1941 as to how their love life prospered, but it apparently fizzled out completely in 1941; she testified that she never saw him *or heard from him* between 1941 and his death in 1951, except *one time* when she met him accidentally on the street in San Francisco. (Tr. 110 and 122.)

It is highly significant that the record does not show any attempt by appellee to locate Mr. Sidebotham in those ten years or to claim any support from him. In fact in her Nevada divorce complaint in 1946 she asked for no alimony from him and said "that there is no community property to the plaintiff and defendant hereto belonging". (Tr. 115.) He had her address at 380 Union Street, San Francisco, where she lived for many years after the Wyoming divorce in 1940. He sent her no money there, did not write to her there, nor did she know where his home was. (Tr. 98-99.) This is strong corroboration of his belief that he owed her nothing and the facts (especially the Nevada divorce complaint) *strongly indicate that she thought so too*. If she thought she had any rights against him or any prospect of collecting from him she would have and should have asked for help through her shrewd lawyer, Mr. Ruiz, as she did in 1933 when she filed her separate maintenance action, and again in 1952 when she commenced the present action. That appellee's contact with her clever counsel Manuel Ruiz, Jr., since 1932 has been more than casual can be seen from the fact that he had her living on his Mexican ranch

in 1954 for a month, i.e. after the decision on her appeal and prior to the trial. (Tr. 104.) That she did not make the statement in the Nevada complaint that “there is no community property” inadvisedly or ignorantly is shown by the fact that under *Mr. Ruiz’* able tutelage she swore in her 1933 separate maintenance complaint (Defendants’ Exhibit C, Tr. 95), that *there was community property* of Mr. Sidebotham and herself. Even if Mrs. Sidebotham did not read the Nevada complaint her lawyer is presumed to have done his duty when he prepared her complaint (*Dolinar v. Pedoni*, 63 C.A. 2d 169, and *Pasadena Laboratories v. U.S.A.*, 169 F. 2d 375) and he undoubtedly got this information from her and did not make it up out of his dreams. She did not testify that she could not read or that she did not understand English. The evidence is all to the contrary. In fact at the trial she did not testify that she did not read the complaint when she signed and swore to it or that she did not understand it. (Tr. 118-120 contains *all* the evidence on the subject of the Nevada divorce case.)

Let us see now what means of knowledge were open to her after 1941 showing her *laches* from then on.

She knew how to approach the first Mrs. Sidebotham for information. (See Defendants’ Exhibit D, Tr. 96 and 97.) This exhibit (the envelope) shows that respondent knew the address of Mrs. Thayer, a sister of Mr. Sidebotham. (See also Tr. 96.) She was in correspondence with her husband’s other sister, Lois Umbsen, as late as 1939. (Tr. 126-127.) Respondent was Mr. Sidebotham’s secretary in New

York, Boston and Los Angeles, in which last named city she knew he had *four* offices. (Tr. 97-98.) She helped him sell real estate in Los Angeles. Most of the time from 1935 to 1947 she worked for Dempsey Realty Co. in San Francisco. (Tr. 99-102.) She knew also that he bought a piece of property in Crescent City. (Tr. 102.) He was a registered voter in San Francisco at 10 Rossi Avenue and voted there from 1942 to 1950 (Defendants' Exhibit I, Tr. 227-228.), and there was a telephone at said address from May 1945 to August 1950. (Tr. 231.) In 1950 he became a record owner of an apartment house on Geary Street in that city. (Defendants' Exhibit H, Tr. 226.) During 1950-51 his address at 10 Rossi Avenue was also on the books of the Tax Collector, and the P.G.&E., to which the bills for his property were sent. (Tr. 228-229.) From 1942 to 1950 Mr. Sidebotham's address was a matter of public record in San Francisco. (Tr. 227.) During most of the same period of time she herself lived, and worked for a real estate firm, in San Francisco. (Tr. 99-100.)

Appellee knew from 1941 on that he was making no effort to support her or even to see her. If she had any *property rights* to assert against him, she should have started asserting them, or at least investigating them in 1941 and certainly any high school boy could have found his permanent address for her in a matter of hours. This lack of any action by her for ten years and until *after* he died and she had found out he had *substantial* means, completely bars and estops her from claiming any interest in any of his assets.

OBVIOUS FALSITY AND INHERENT IMPROBABILITY
OF PLAINTIFF'S CASE.

A calm survey of Helene Marceau's conduct from 1926 to 1952 based on the uncontradicted evidence in this case shows she was Robert Sidebotham's companion by voluntary choice from 1926 to 1928 travelling all over the United States together "without benefit of clergy" until they were married by a Civil Officer in Tijuana, Mexico, on May 30, 1928. After that she lived on and off with him (highlighted by several severe estrangements) as long as she could until 1940 when he completely and finally abandoned her and got a divorce from her in Wyoming in 1940. In 1946 (not having heard from him or received any money from him since 1940) she divorced him, not asking for any alimony and stating in her sworn complaint "there was no common property". Her entire conduct from the beginning, as mistress, and throughout her hectic "on again, gone again", married life with him, shows she was a calculating adventuress. It also shows that she was an unmitigated liar. Consider among others, the following seven items of uncontradicted evidence:

1. Her "common law marriage" in New York on January 1, 1927 (Tr. 87-89), as pleaded in her first complaint, mysteriously withdrawn in her later pleadings, and finally positively *denied* at the trial. (Tr. 87-88.)

2. Her settlement agreement of April 24, 1930 (executed less than two years after her marriage) in which she extorted an agreement from her husband to pay her \$1,000.00 in exchange for a

promise not to prosecute him for an assault and any other criminal offense (this was an attempt to compound a crime, which is of course illegal, Section 153 California Penal Code).

3. Her letter to the first Mrs. Sidebotham dated March 3, 1932 (Defs'. Ex. D), attempting to extort important information by veiled threats for the purpose of seeing how much more money she could squeeze out of her husband, which reads as follows: (See photostatic copy of letter earlier in this brief.)

4. Her separate maintenance suit which she started in March 31, 1933, in Los Angeles, California, in which she asked for more support but not for a divorce and which she never dismissed. (Tr. 96.) This complaint is full of unusually lurid allegations of physical cruelty by Mr. Sidebotham which are in marked *contradiction* of her statement in her letter of March 3, 1932, to the first Mrs. Sidebotham that: "I will do all I can to save any publicity that might cause embarrassment to himself (Mr. Sidebotham) and family". (Defs' Ex. D.) In this complaint she never once complained of intoxication by her husband which casts grave doubt on her statement at the trial that he only treated her cruelly "when he was intoxicated". (Tr. 127-128.)

5. Her complete indifference to what happened to her supposed husband between 1940 and 1952 when she learned of his death and his substantial estate. Consider also that during most of this time she and he were living in San Francisco and that she claimed she did not know he had homes in Stockton and San Francisco. (Tr. 98-99.)

6. Consider the discrepancy in the date of separation alleged in her Nevada complaint as being June 30, 1931 and her lie about its being June 30, 1941 (Tr. 116-117); also the contradiction of the same date in the Los Angeles suit in 1933. These two dates force us to believe she never lived with Mr. Sidebotham as his wife after February 5, 1932 (the separation date alleged in the 1932 suit) but only as a mistress on rare occasions.

7. Her testimony about her complaint in the Nevada suit where she alleged under oath; "There is no community property" is most unsatisfactory; in fact at the trial she made no attempt to explain away why she signed such a complaint. Mr. Manuel Ruiz, Jr., her astute lawyer *since 1933*, put an allegation in her third amended complaint in this case that "when questioned by her attorney (in Nevada), whether there was any community property, she answered that she did not know. That said attorney, unbeknownst to plaintiff, nevertheless framed a formal pleading wherein it was stated that there was no community property. That plaintiff did not read the same".

All of the testimony concerning the Nevada divorce case is on pages 83-84 and 118-120 of the record. Nowhere on any of those pages or elsewhere in the record did she back up those allegations in her third amended complaint nor did she give *any explanation of any kind* as to her signing that complaint with that allegation in it. Therefore it must stand as an uncontradicted admission against her interest, if not as a judgment against her on this issue. Her sworn testi-

mony at the trial is in fact inconsistent with her sworn statements in her third amended complaint.

The opinion of this Court in her favor in case No. 14192, 216 F. 2d 816 was based on the allegations in her third amended complaint and *not on any evidence*. Now that the evidence is so *entirely different* from her final complaint this Court must reach a different result and decide against her on the issue of *res judicata* based on the Nevada divorce, and also on the issues of laches and equitable estoppel.

TRACING OF ASSETS.

Appellee's case is based on the simple rule (and she can recover on no other theory) that any community property Robert Sidebotham had when he and she were divorced (in 1940 in Wyoming) became property owned by them as tenants in common, i.e. half and half. So far so good. But after time marched on and the husband died first, the surviving tenant in common got only the community property which was on hand *at the time of the divorce* or such property as could be *identified* as being the proceeds of or the converted form of the property on hand *at the time of the divorce*. We confidently contend that all of the property on hand at the time of the husband's death was acquired after the Wyoming (1940) divorce as his separate property or with his separate funds. However, the *burden of proof is on*

the surviving wife to identify the property on hand at death as being the community property of the spouses when their marriage was dissolved (as we shall show hereafter by cases). There is not a word in the record or even an insinuation by appellee that Mr. Sidebotham owned any community property in 1940 (and the same is true in 1946 as to more than 97% of his probate assets). Respondent made a great ado about his safe deposit box. If he had *never opened* his box after he first rented his first box in 1943 (which was almost three years *after* the Wyoming divorce) she might well say that he had owned everything that was in it from 1943 until his death. But the record card of the box (Defendants' Exhibit L, Tr. 229-230), shows that he went into the box many times a year from May 22, 1945, down to the time of his death and *fifteen times after* January 1, 1947. The contents of the box revealed nothing that was ear-marked as they consisted of 751 pieces of currency (denominations from \$5.00 to \$1,000.00 bills, totalling \$64,770.00). (Tr. 191-192.) How could anyone trace the entrance of 751 bills into a safe deposit box and then prove they remained there continuously until his death when Mr. Sidebotham went in and out of the box so many times between May 22, 1945, and his death? Not a *single* piece of currency was ever traced as going *into* Sidebotham's safe deposit box. The difficulty of identifying assets in a safe deposit box is well illustrated in the case of *Corely v. Hennessey*, 58 C.A. 2d 225, 238, which case required the clear tracing of assets in an action to establish a trust.

The testimony of Mr. Fontes at the trial as to a few bank and building and loan accounts (no one of which *was in existence at the time of the Wyoming divorce*) was not helpful either. The entries of deposits and withdrawals through the years was not given and this Court knows that accounts like these are like the safe deposit box records—"In and out—in and out". The account records to have weight must show the *balances* as of the *date of the divorce (whichever year is taken)*, and then the *balances* throughout the periods of the accounts including the balances that remained on hand *at death*. The evidence in the record is too incomplete to have any probative value.

OBVIOUS FALSITY AND INHERENT IMPROBABILITY
OF PLAINTIFF'S CASE.

Plaintiff's case, which depends entirely on her own testimony, has no weight and cannot be sustained, because her testimony is obviously false.

In 4 Cal. Jur. 2d 605, it is said that a judgment is unwarranted as a matter of law

"Where the testimony, in the light of the undisputed facts, is inherently so improbable and impossible of belief as to constitute no evidence at all."

In this case the only testimony of the plaintiff that supported her case was that Mr. Sidebotham told her several times he was "broke" and "had a hard time" and that she believed him (Tr. 78, 84, 102); hence she made no investigation of his finances before he died

to see if there had been any community property when she divorced him and, if any, where it went.

Flimsy as this testimony was it might support a judgment if it could be believed. It is obviously false however because *all* her testimony is incredible in view of the many falsehoods she has been caught in. In view of the history of her life with him as she told it (on the witness stand and in the complaints in her two suits against him) her alleged *belief in his statements* is inherently improbable. Such testimony cannot support a judgment.

Herbert v. Lankershim, 9 C. 2d 409, 471-473, 71 P. 2d 220, 251-252 (a suit by an unscrupulous nurse against a dead man's estate) where the Court said:

“While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (*Grant v. Chicago, etc., Ry. Co.*, 78 Mont. 97, 252 P. 382), and, in determining this question, ‘the credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. “It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment.” ’ ”

Citron v. Fields, 30 C.A. 2d 51, 62-63, 85 P. 2d 534, 540. In this case the Court in finding there was no substantial evidence to support the award laid stress on the poor character of the main witness in the following terms:

“Respondent stands impeached by his own testimony and the evidence furnished by him”, and

later in the opinion the Court emphasized the witness' lack of character by saying:

"In view of the unreliability of this witness we must regard much of what he said as 'mere swearing', which cannot be regarded as substantial evidence without supporting the rather remarkable judgment of \$12,000.00 to a physician whose past history in his profession is not without serious blemish."

So in the case at bar we submit that plaintiff's character, which is not without serious blemish, and her testimony which was contradictory in several important parts, and which was also impeached by sworn statements signed by her, completely destroys the value of her testimony and leaves the judgment without any credible testimony in support of it.

Guardianship of Sturges, 30 C.A. 2d 477, 496-497, 86 P. 2d 905, 914;

Estate of Teed, 112 C.A. 2d 638, 643-646, 247 P. 2d 54;

Lee Way Motor Freight v. True, 165 F. 2d 38, 41 (C.C.A. 10);

U. S. v. Thornburgh, 111 F. 2d 278, 280 (C.C.A., 8).

It is most significant and legally important that appellee admitted that the last time she saw Mr. Sidebotham was in 1947. This was *five years before* she filed this suit and the *last time* he could have fooled her, if he did. Certainly the doctrine of laches has barred her case.

THE LAW.**I.****EFFECT OF OPINION ON PRIOR APPEAL.**

Preliminarily we should point out that this case was before this Court before in case No. 14,192 involving only the sufficiency of the last complaint, i.e. the third amended complaint. 216 F. 2d 816.

None of the evidence produced at the trial by the appellee and that of the appellants meeting the appellee's evidence and supporting their affirmative defenses was before this Court on the prior appeal. This completely changed the picture of the case as it appeared in the third amended complaint; in fact the proof at the trial was completely different from the allegations in the last complaint. There is therefore nothing in the prior opinion which is pertinent on this appeal. It certainly is not the "law of the case."

As to the effect of the prior opinion in this case see:

4 *Cal. Jur.*, 2d 594, Sec. 688;

DeParcy v. Liggett & Myers, 81 F. 2d 777, 779,
certiorari denied in 298 U.S. 689;

Blatz Brewing Co. v. Collins, 88 C.A. 2d 438,
199 P. 2d 34.

II.

THE APPELLEE WAS REQUIRED TO PROVE THAT THE PROPERTY ON HAND AT THE DATE OF DEATH WAS THE SAME PROPERTY OWNED BY MR. SIDEBOTHAM WHEN HIS MARRIAGE WAS DISSOLVED.

The burden of proof in this case is clearly fixed on the appellee by subdivision 40 of Section 1963 of the Code of Civil Procedure, *codifying* the previously Court-approved presumption but setting a four year period in cases of divorces. This reads as follows:

“All other presumptions are satisfactory if contradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind . . . 40. That property owned at the time of death by a person who had been divorced from his or her spouse more than four years prior thereto was not community property acquired during marriage with such divorced spouse, but is his or her separate property.”

It has clearly been the law by Court decisions since *Estate of Simonton*, 183 Cal. 53, 190 Pac. 442 that after a marriage has been dissolved (such as by death of the wife or divorce obtained by the wife) and later the husband died, the wife, (or the heirs at law of the wife), claiming a portion of the husband's estate as being community property *has the burden of proving* that the property left by the husband and claimed by the wife (or by her heirs) is the same property which was on hand when the marriage relation was dissolved by the wife's divorce or death.

One of the clearest cases on this point is *in re Adams' Estate*, 132 C.A. 2d 190, 203; 282 P. 2d 190, at 198. In this case the marriage was dissolved by the death of the wife in 1941. Subsequently the husband died intestate in 1951 and certain heirs at law of the wife claimed his estate on the ground it was community property. The Court recognized the rule of law stated by respondent that property on hand *when the marriage was dissolved* is presumed to be community property as of that time, but the Court pointed out that this is only half of the legal problem. The Court said after a claimant identifies certain property as being on hand *when the marriage was dissolved* (which would presumably make it community property in the absence of proof to the contrary), *he* then has the burden of proving that the property on hand *when the surviving spouse*, (such as the husband here) *died* was the same property as the community property *on hand when the marriage was dissolved*. One of the main points at issue in that case was as to certain valuable securities which were on hand at the time of the death of the husband, the surviving spouse. The Court said that the heirs of the husband who claimed that the securities were his separate property made out a prima facie case by showing that the securities were in his estate at the time of his death. The Court then went on to say that the heirs at law of the *spouse first dying* then *had the burden of proving that the securities were the community property* of the two spouses. The reasoning of the Court on this point is as follows:

“ . . . upon the death of the wife, intestate, where the husband acquires all of the community property, he becomes the absolute owner of it, so that there no longer is community property in the true sense, nevertheless for purposes of succession under section 228 of the Probate Code, ‘the statutory provisions determining what is community property as construed by our decisions remain in force and applicable throughout the life of the surviving spouse, *as to all property constituting community property of the spouses at the time of the death of the pre-deceased spouse.*’ In re Estate of Brady, 171 Cal. 1, 7, 151 P. 275, 277. *But when the surviving spouse dies intestate, the presumption is that all property in his estate is his sole and separate property, and the one claiming it to be community must assume the burden of proving what portion of that estate was in fact the community property of the two parties at the time of the death of the predeceased spouse.*”
 (All emphasis ours throughout.)

“ Upon his death intestate the heirs of the wife who, by virtue of section 228, became the statutory heirs of the husband, are entitled under that section in the circumstances there set forth, to one-half of the property that was formerly community property. *But the burden is on them to prove what was community property, and to trace it into the estate of the surviving spouse.* That burden requires *two steps* in the proof. First, as already pointed out, the predeceased spouse’s heirs must prove what portion of the property was community property at the time of the death of the predeceased spouse. In making that proof, as already

held in this opinion, the presumption is that property acquired or in possession during the marriage was community property. *Then the heirs of the predeceased spouse have the burden of tracing the community property into the property found in the estate of the surviving spouse. In meeting this burden such heirs now find the presumptions reversed.* Now the presumption is, that the property in the estate of the surviving spouse, is the separate property of the surviving spouse, and, under the rule of the cases cited above, *the heirs of the predeceased spouse must overcome that presumption by tracing the community property existing at the death of the predeceased spouse into the estate of the surviving spouse.* Failing to so trace the community property *by overcoming the presumption of separate character*, the property in the estate of the surviving spouse must be treated as the separate property of the surviving spouse and distributed to his blood heirs.” (all italics throughout added.)

.

The most important statement in this opinion, and which is completely applicable in the present case, is the statement that when the heirs of the predeceased wife sought to claim the property of the husband as community property, the usual presumptions *were reversed* when the death of the surviving spouse occurred. As Mr. Justice Peters said “In meeting this burden such heirs now find *the presumptions reversed.*”

In the case quoted the marriage was dissolved by the death of the wife and not by her divorce as in this

case. The rights of the husband's heirs and the rule as to presumptions must be the same whether the marriage was dissolved by death or divorce.

See also

In re Hanson's Estate, 126 C.A. 2d 71, 77, 271 P. 2d 563, 567;

Estate of Doran, 138 A.C.A. 618, 625, 627, 628, 292 P. 2d 655, 661-662;

Estate of Rattray, 13 C. 2d 702, 705-706, 91 P. 2d 1042;

Estate of Simonton, 183 Cal. 53, 59-60, 190 P. 442, 445;

Estate of Harris, 9 C. 2d 649, 662, 72 P. 2d 873;

Estate of Anderson, 142 A.C.A. 453, 298 P. 2d 105, 107 decided June, 1956.

If community and separate property are so commingled that its identity can't be traced it will be presumed to be separate.

Pickens v. Marriam, 274 Fed. 1, 11 (C.C.A. 9);

Estate of Brady, 171 Cal. 1, 5, 151 Pac. 275;

Moore Estate, 65 Cal. App. 29, 31-33, 223 P. 73.

III.

THE DECREE ESTABLISHING HEIRSHIP IN THE MATTER OF THE ESTATE OF ROBERT RUSSELL SIDEBOTHAM IN THE SAN FRANCISCO SUPERIOR COURT, FILED ON DECEMBER 14, 1953, IS RES JUDICATA OF THE MAIN ISSUES IN THIS CASE.

Examination of the third amended complaint in the present case and comparison of it with the petition in the heirship matter filed in the San Francisco Superior Court on December 4, 1952, demonstrates clearly that the same issues were involved in the heirship proceeding as in this proceeding and substantially the same parties were involved, except for the addition of the Public Administrator as a defendant in this case. As a matter of law he of course represents the sons who are the real parties in interest other than creditors and taxing agencies.

Appellee's counsel will argue that in spite of the fact that *Mrs. Sidebotham filed the petition* in the heirship proceeding she could ignore it when she received notice of the hearing on her petition. She claims that the Probate Court had no jurisdiction to hear this proceeding because she was a stranger to the estate. She overlooks the fact that the Probate Court of California was then a Court of general jurisdiction as stated in *Schlyen v. Schlyen*, 43 Cal. 2d 361, 273 P. 2d 897, being merely a division of the Superior Court of California with all its general jurisdiction and not a separate Court with limited jurisdiction. Since *Mrs. Sidebotham voluntarily commenced* the proceeding by *filing her petition* in the probate division and the two sons who were the real parties in interest appeared by

their formal answer, the issues were joined in the probate division and that division became then in effect a Court of equity and could dispose of the issues, even though that division could not have made a decree against her if she had been an objecting defendant rather than the petitioner.

Faxon v. All Persons, 166 Cal. 707 at 711 and 712, 137 Pac. 919;

Wells Guardianship, 140 Cal. 349 at 352; 73 Pac. 1065;

Estate of Riccomi, 185 Cal. 458 at 463; 197 Pac. 97.

The last cited decision held that a case was properly tried in the Superior Court even though it was entitled as a probate matter; see also *Laurel Hill Cemetery v. All Persons*, 69 C.A. 2d 190 at 200; 158 P. 2d 759. In this case it was held that the Superior Court did not have jurisdiction to try a McEnerney suit because all of the defendants had not been served, but that the decree made by the Superior Court was valid as a general quiet title decree because the appealing defendants appeared in the action and did not contest the right of the Court to try the action as a general quiet title action as far as they were concerned.

See also the opinion by Judge (later Chief Justice) Taft in *Elder v. M'Claskey*, 70 Fed. 529 at 554 (C.C.A., Sixth Circuit, 1895).

In this case it was contended that the trial Court could not take jurisdiction over a partition suit in equity before the disputed questions of title had been

settled by an action at law. Judge Taft answered this contention in his opinion by saying:

“As the complainants and cross-complainants went into equity they cannot complain of a decree on the merits.”

See also 21 C.J.S. 132 Section 85 Courts.

It is well established and therefore conclusive in this case that the Probate Court has concurrent jurisdiction with the Superior Court where all the parties appear and do not object to the Probate Court acting as the Superior Court.

Medeiros v. Cotta, 130 C.A. 2d 740, 279 P. 2d 814.

In this case a widow filed an action in the *Superior Court* against the grantee of a deed from her husband to set aside the conveyance of half the property conveyed by him as community property. The trial Court held this cause should have been tried in the probate division which it thought had exclusive jurisdiction. The Appellate Court conceded that before the decision in *Schlyen v. Schlyen*, 43 Cal. 2d 361, 273 P. 2d 897, this question might have been decided in favor of the probate division's exclusive jurisdiction, but that the *Schlyen* case required a holding that the case was properly tried by the Superior Court. This was because the plaintiff allowed the probate proceeding to be closed before trial of her action in the Superior Court and that she made no objection to the trial by the Superior Court. The opinion of the Court on this point is as follows:

“So even assuming that the action filed by respondent was to recover property wrongfully claimed by the representative of the estate and to have it included in the assets of the estate, it is clear from the opinion in *Schlyen v. Schlyen* that *respondents failed to make a timely objection that the issues involved should be tried in probate.*”

In *Medeiros v. Silva*, 132 C.A. 2d 771 at 775, 283 P. 2d 50, almost identically the same facts occurred as in the last case and the Court summed up its holding on the jurisdictional question in the following language: “the jurisdiction of the superior court sitting in probate to try title to property as between heirs and personal representative is not exclusive, and the superior court under its general equitable jurisdiction may also, *in the absence of timely objection*, try such title in widow’s action to set aside husband’s gift of her share of community property made before his death.”

Another case containing the same holding is *Medeiros v. Medeiros*, 138 A.C.A. 230 at 234, 291 P. 2d 142. In the following cases it was held that the failure of parties to object to the Superior Court exercising its general powers even through the matters before it were usually tried in the probate division of that Court estopped such parties from complaining thereafter of any lack of jurisdiction.

Simons v. Bedell, 122 Cal. 341, 346, 55 Pac. 3.

Here a plaintiff went into a Court of equity to determine who was entitled to distribution of property which was being administered in the probate division. The fact that no objection was made to the Superior

Court going ahead with the trial was held to estop any complaint on the ground of lack of jurisdiction.

See also:

In re Clary, 112 Cal. 292 at 294, 44 Pac. 569;

In re De Leon, 102 Cal. 537 at 541, 36 Pac. 864;

Thompson's Estate, 101 Cal. 349 at 353, 35 Pac. 991, 992.

Entirely apart from these older holdings, the *Schlyen* case made it quite clear (43 C. 2d 361, 376, 273 P. 2d 897, 900) that as the result of the Court reorganization legislation which took effect on January 1, 1952, a case which was set for trial in the equity division, but properly belonged in the probate division, would not be dismissed for lack of jurisdiction by the equity division, but would be transferred to the probate division on request by a simple minute order. So in the proceeding to determine heirship referred to, if Helene Marceau Sidebotham had appeared and had objected to the trial by the probate division, that division would by a simple minute order have transferred the matter to the equity division. Its failure to do so, however, in the absence of a request by Helene Marceau Sidebotham, did not deprive it of jurisdiction to go ahead with the hearing. The reasoning of the Court in the *Schlyen* case on this point is as follows:

“The notice of this motion was filed on December 3, 1951, 29 days before January 1, 1952, the effective date of the court reorganization legislation. If this action had been commenced after January 1, 1952, and it appeared by appropriate order and showing that the court was without jurisdiction of the subject matter, the court could have trans-

ferred the cause to the proper court for disposition. But it is not necessary to seek to apply the new rule of procedure to this case for the reason that here we have a case where the superior court in which the action is pending had jurisdiction of the subject matter of the action *either as a case to be disposed of in the exercise of its equity jurisdiction or to be adjudicated in the probate proceeding pending in the same court, depending on the circumstances existing at the time the motion to dismiss was made. Where the superior court has jurisdiction over the particular class of cases in question it is the established rule that if no objection on the ground of another action pending or other appropriate objection be timely made it is deemed to be waived.* In re Estate of Dombrowski, 163 Cal. 290, 297, 125 P. 233; In re Estate of Latour, 140 Cal. 414, 425-426, 73 P. 1070, 74 P. 441."

In this case the proceeding to determine heirship was commenced after January 1, 1952, when the Court reorganization legislation took effect.

Appellee will probably answer that a party cannot give jurisdiction to a Court, not having it, by consent or by failure to object. This is true as to jurisdiction over the *subject matter* but it is not true as to jurisdiction *over the parties*. The Probate Court has always had jurisdiction over the *subject matter* of heirship determination but not over *parties* strangers to the estate. Hence appellee could and did waive lack of jurisdiction over her person by initiating the proceeding. This distinction is well stated in 13 Cal. Jur. 2d 591, sec. 82 Courts, as follows:

“The rule that jurisdiction of the subject matter cannot be conferred by the consent or acts of the parties has no application where the question is as to a tribunal’s jurisdiction over the *person* of a party to a controversy, and where the tribunal has jurisdiction of the subject matter. Jurisdiction over the person can be conferred by consent, manifested by the party’s voluntary appearance, as provided by the Code of Civil Procedure, or by his seeking, taking, or agreeing to some act or step in the proceeding or action.”

IV.

THE DISTRICT COURT ERRED IN NOT GIVING FULL FAITH AND CREDIT TO THE WYOMING DECREE.

The decree of divorce dated November 2, 1942, rendered by the District Court of the Second Judicial District sitting within and for the County of Albany and for the State of Wyoming contains the following recitals:

“and it appearing to the court that due and legal service has been had on the defendant by publication, a proof of which publication is filed herein; and it appearing further from the affidavit of the plaintiff that he has exercised due diligence and inquiries as to the whereabouts of the defendant; that her residence is unknown and cannot with reasonable diligence be ascertained and the defendant being in default for want of an answer”, etc. (Defs’. Ex. E.)

This decree was made after an affidavit was filed by the plaintiff Robert R. Sidebotham on August 6, 1940, in which he said:

“that he has exercised due diligence and inquiry as to the whereabouts of the above named defendant and that he finds that said defendant does not reside in the State of Wyoming; that her residence is unknown and cannot with reasonable diligence be ascertained; and that from the facts above stated this case is one of those mentioned in Section 89-817 and 89-822 Revised Statutes of Wyoming, 1931.” (Defs.’ Ex. E.)

It should be noted parenthetically that under the statutes of Wyoming no order of publication of summons is required before publication of summons takes place. Therefore the Courts are more liberal in construing affidavits made prior to publication under such statutes than they would be in a state like California where the Court must make an order for publication of summons before the summons can be published. The affidavit in the Wyoming divorce case is almost identical with the affidavit in *Clarke v. Shoshoni Lumber Co.*, 224 Pac. 845 at 849 and 850. The affidavit in the last named case was approved by the Supreme Court of Wyoming and subsequently a writ of error from this decision was dismissed by the U.S. Supreme Court, which refused to disapprove the opinion of the Wyoming Court approving the service of summons by publication in that case.

It is elementary that the recitals in the decree of a Court of general jurisdiction as to the service of summons cannot be collaterally attacked.

49 C.J.S. 849, sec. 427 Judgments, states the rule well as follows:

“Where a court of general jurisdiction judicially considers and adjudicates the question of its jurisdiction, and decides that the facts exist which are necessary to give it jurisdiction of the case, the finding is conclusive, as discussed in Courts sec. 115, and generally cannot be controverted in a collateral proceeding.”

See also *Davis v. Johnston*, 144 F. 2d 862 (C.C.A. 9th-1944) certiorari denied by Supreme Court, 323 U.S. 789.

It has been held several times recently by the Wyoming Supreme Court that the recitals in the decree as to procedural steps are conclusive and cannot be attacked by anything outside the record.

Jones Truck Co. v. Superior Oil, 234 P. 2d 802, 809;

Hume v. Ricketts, 240 P. 2d 881 at 882.

Since the affidavit of publication is not even a part of the judgment roll according to Wyoming law (Wyoming Compiled Statutes of 1945, Section 3-5406), it would seem that the sufficiency of the affidavit of publication of Robert Sidebotham, deceased, cannot even be considered on collateral attack.

Hoagland v. Hoagland, 57 P. 20 at 22 (Utah).

V.

HELENE MARCEAU SIDEBOTHAM HAS BEEN GUILTY OF IN-EQUITABLE LACHES AND DELAY AND THE DISTRICT COURT ERRED IN NOT HOLDING THAT HER ACTION WAS BARRED BOTH BY LACHES AND BY THE DOCTRINE OF EQUITABLE ESTOPPEL.

Our contention on this point is best stated in the following quotation from the opinion in *Champion v. Wood*, 79 Cal. 17, 21 Pac. 534, in which the Court stated the facts and its conclusions about the conduct of the wife in that case quite fully as follows:

“It seems quite incredible that the plaintiff, while engaged in a hostile action against her husband, could cherish such unbounded love and confidence in him as is set forth in the complaint. For a period of 16 months before she commenced her action for a divorce she was unable to live with him. His conduct had been such—he had so far forgotten his marriage vows—that she not only could not live with him, but she demanded that the bonds existing between them should be severed. With the improbability of the truth of plaintiff’s statements, however, we have little to do in determining whether the facts are sufficient on demurrer; but a stale demand, under such circumstances, does not commend itself to a court of equity. The plaintiff severed all connections with her husband on October 11, 1884. *This action was not commenced until about three years and a half thereafter.* It is clear that the question of property was not overlooked in the divorce suit. There was inserted in the complaint an allegation ‘that there was no common property’. It is not at all probable that the plaintiff drew her own complaint, and conducted her own case. The general rule is that the judgment of a

court of competent jurisdiction, having jurisdiction of the subject and the parties, is conclusive upon the same parties in any other proceeding in law or in equity, unless reversed or set aside in some mode prescribed by law. Judgment may be attacked on the ground of fraud and misrepresentation, it is true, but relief will not be granted unless the party seeking the same has been free from negligence. If the judgment has been brought about through the carelessness of the injured party, he will not be relieved therefrom. *Quinn v. Wetherbee*, 41 Cal. 250. *The relations of the plaintiff here with her husband were such that it was negligence, we think, on her part to rely upon him in a matter of so much importance as her property rights.* Having determined that the bonds of matrimony must be dissolved, *the first thought which would naturally occur to a person of ordinary caution and care would relate to the children, if there were any, and to the property. Plaintiff's failure to obtain independent advice and information was inexcusable carelessness.* Something must have been said to her attorney about the property when drawing the complaint. *That was the time and the occasion for consultation with her legal advisor as to her property rights.* A simple question, propounded at that time, would have led to a different result. The fact alleged 'that her husband systematically and persistently, during all the time of their residence in California, continuously represented, declared, and asserted to plaintiff that the property he owned and had acquired since said marriage was his sole and separate property,' etc., was sufficient of itself to create suspicion in the mind of plaintiff, as a prudent person, and, when

continued for several years after separation and divorce, to lead her to make some inquiry on the subject. We agree with the court below that 'the complaint fails to show any equities entitling the plaintiff to relief.' "

The opinion was joined in by those outstanding jurists Chief Justice Beatty and Mr. Justice McFarland. It is particularly strong here because it was decided that the complaint was insufficient as against *general demurrer*.

Consider in particular the following facts in *Champion v. Wood* on which the Court based its opinion which are parrallel to those in the present case (1) the period of several years far in excess of the sixteen (16) months in the *Champion v. Wood* case in which the appellee did not live with her husband; (2) the dissolution of the bonds of matrimony by the wife herself about five (5) years before the husband's death; (3) the commencement of the present action more than sixteen (16) months after the severance of all connections between the wife and the husband, more than three and a half (3½) years before the divorce suit which in this case was a lot longer; (4) the fact stated in *Champion v. Wood*:

"It is not at all probable that the plaintiff drew her own complaint and conducted her own case;"

(5) The conclusion stated in *Champion v. Wood* that: "if the judgment has been brought about through the carelessness of the injured party, he will not be relieved therefrom," should apply equally well here.

(6) The negligence of the wife in not making any investigation of her property rights for more than 3½ years; (7) Mrs. Sidebotham's claim that her husband told her several times he was broke; but as was said in *Champion v. Wood*:

“The relations of the plaintiff here with her husband were such that it was negligence, we think, on her part to rely on him in a matter of so much importance as her property rights.”

(8) Quoting again from this case:

“Having determined that the bonds of matrimony must be dissolved, the first thought which would naturally occur to a person of ordinary caution and care *would relate to the property;*”

(9) Again as was said in *Champion v. Wood*:

“Plaintiff's failure to obtain independent advice and information was inexcusable carelessness;”

(10) Once more as said in *Champion v. Wood*:

“Something must have been said to her attorney about the property when drawing the complaint.”

Otherwise the language that there was no community property would not have appeared in the complaint, as her lawyer was presumed to have done his duty in the absence of clear proof to the contrary;

(11) Therefore, as the Court said in *Champion v. Wood*:

“that (the time she got the divorce) was the time and the occasion for consultation with her legal adviser as to her property rights.”

Mr. Sidebotham did not hide from appellee in this case and she could have easily found him and served him with process at any time for nearly ten years before he died. He was registered continuously as a voter at 10 Rossi Avenue, San Francisco, for nearly ten years. (Tr. 227.) During most of that time there was a telephone at that address in the name of Ruth Ramsey. (Tr. 231.) Appellee during most of that time was also a resident of San Francisco. Tr. 227.) In 1950 Mr. Sidebotham bought an apartment house worth \$30,000 (Tr. 226), and *put it in his own name*. During most of the time from 1940 to 1951 appellee worked for a real estate firm in downtown San Francisco. (Tr. 99-100.) Undoubtedly her firm subscribed to "Edwards Abstract", a daily publication which reported all real estate transfers in San Francisco. (Tr. 233-234.) It is inconceivable that she, or at least a fellow employee of hers, did not see the record of the purchase of the \$30,000 apartment house in Mr. Sidebotham's name, and comment on it. A visit to the Assessor's office in the City Hall in San Francisco would quickly have disclosed to her the address to which the Assessor's office was sending the tax bill for this property to Mr. Sidebotham. A visit to the Registrar of Voters' office in the City Hall at any time for nearly ten years prior to Mr. Sidebotham's death would have disclosed his address as 10 Rossi Avenue, San Francisco. (Tr. 227.)

Why did Mrs. Sidebotham not contact Mr. Sidebotham in San Francisco for ten years? Because she knew (as she alleged in her Nevada complaint)

that he owned no community property of their marriage in 1946 and she knew that *as long as Robert Sidebotham was alive* he could prove it.

As soon as Robert Sidebotham died she knew his mouth was stopped, that his family were non-residents of California (Tr. 96, 126-127), and that his books and records would probably be hard to find. She also felt confident that her unsavory past would not be disclosed nor her history of seeking to squeeze money out of him on at least three occasions, starting at least as early as 1932, if she did not sue until after his death.

This explains why she came out of hiding in 1952 and started her campaign to grab his substantial assets.

In addition to all of these circumstances relied on by the California Supreme Court in finding laches in *Champion v. Wood*, it must never be forgotten that the mouth of the husband is now stopped by death, his witnesses and his records are unknown and scattered to the four winds, and the administrator of his estate is at a great disadvantage in making any defense to this action.

All of these facts bar the appellant in this case from asserting her cause of action, both on the ground of laches and on the ground of equitable estoppel.

MISCELLANEOUS RULINGS ON EVIDENCE COMPLAINED OF.

(a) The Court erroneously admitted in evidence the testimony of Daniel J. Byrne, an employee of the

American Trust Company at its safe deposit department in its branch bank at Stockton and O'Farrell Streets, San Francisco, California. The testimony in question attempted to identify a contract for the rental of safe deposit box No. 1861 in the Security Safe Deposit Company in the City and County of San Francisco, State of California, dated January 9, 1943. Objection was made to the admission in evidence of this contract in the following language:

"Mr. Trowbridge. I think, Your Honor, that we have showed that there is no foundation there.

The Court. In what respect hasn't the foundation been laid?

Mr. Trowbridge. Because it is a separate bank, a separate independent bank; no employee of the American Trust Company has filled out any of the blanks on this form. It is purely hearsay, entries by third persons in another bank, and I don't see how that can possibly be admissible."

(Tr. 133.)

This contract was marked Plaintiff's Exhibit 6 (Tr. 134), subject to a motion to strike out, and a motion to strike this evidence out was made at the end of the trial and never acted on by the Court (Tr. 235-238).

(b) There was admitted in evidence over our objections a series of two cards relating to an "Individual Lease Agreement" for the same box, No. 1861, in the same safe deposit company, the Security Safe Deposit Company in the City and County of San Francisco, State of California, which was admitted

by the Court subject to a motion to strike. This was marked Plaintiff's Exhibit 7. (Tr. 136.) A motion to strike it out was made at the end of the trial and never acted on by the Court. (Tr. 235-238.) The objections of counsel to the admission of these cards in evidence was as follows:

"Mr. Trowbridge. We object to this on the same grounds, no proper foundation laid, hearsay, not a business record maintained by the American Trust or by this gentleman.

The Witness. We used that card.

Mr. Trowbridge. Just a moment, please. And that it is irrelevant, immaterial and incompetent."

(Tr 134.)

(c) The Court admitted in evidence over our objections a card containing a contract relating to safe deposit box No. 2173 dated May 21, 1945 of the American Trust Company branch bank at Stockton and O'Farrell Streets, San Francisco, California. This card was marked Plaintiff's Exhibit No. 8 (Tr. 139) subject to a motion to strike.

Objection to the admission in evidence of this testimony was made by counsel in the following language:

"Mr. Trowbridge. Just a moment. Will it be understood we have the same objection to this testimony that we made to the other testimony?

The Court. A running objection.

Mr. Trowbridge. It is a running objection, Your Honor, subject to a motion to strike?

The Court. Right."

(Tr. 139-140.)

A motion to strike out this card was made at the end of the trial and never acted on by the Court. (Tr. 235-238.)

The objection was the same objection that was made to the exhibit described in specification "a" hereof and was incorporated by reference as shown by the later ruling of the Court stated as follows:

"Mr. Trowbridge. Just a moment. Will it be understood we have the same objection to this testimony that we made to the other testimony?

The Court. A running objection.

Mr. Trowbridge. It is a running objection, Your Honor, subject to a motion to strike?

The Court. Right."

(Tr. 139-140.)

(d) The Court erroneously admitted in evidence over counsel's objection the oral testimony of Daniel J. Byrne reading as follows:

"Mr. Ruiz. Q. Calling your attention to Plaintiff's Exhibit 6, being the original contract dated January 9, 1943, on the reverse side thereof it gives an address, 220 Golden Gate Avenue, and it says 'Notify Lois Umsen.' Can you tell me, if you know, who put that name of the sister down there, Umsen?

A. Well, I am pretty sure that is Mr. Jones' handwriting.

Q. Mrs. Jones?

A. Mr. Jones. Both he and she were then Mr. Jones.

Q. Who is Mr. Jones?

A. He was the man that ran that vault; it used to belong to the Brotherhood Bank.

Q. Are you acquainted with Mr. Jones' signature?"

(Tr. 139.)

This testimony was objected to in the same language quoted under specification (c) hereof and subject to a motion to strike. (Tr. 139-140.) A motion to strike out this testimony was made at the end of the trial and was never acted on by the Court. (Tr. 235-238.)

(e) The Court erred in admitting in evidence Plaintiff's Exhibit No. 9, over counsel's objection and subject to a motion to strike. The motion to strike out was made at the end of the trial and was never acted on by the Court. (Tr. 235-238.) The grounds for the objection to the admission in evidence of Plaintiff's Exhibit 9 were set forth in the objection of counsel to the evidence described in specification "a" hereof, which by order of Court was made applicable to all subsequent testimony along the same line. See the language quoted at the end of specification "a" hereof.

(f) The Court erred in admitting in evidence over the objections of counsel certain testimony of Frank J. Fontes the full substance of which is a summary of accounts with the following named banks, building and loan associations and stock brokers, giving the dates when the accounts were opened and the amounts collected by the defendant administrator, as follows (Tr. 174-183):

Names of Institutions	Dates of Opening Accounts	Original Amounts	Amounts Due at Death
Eureka Federal Savings & Loan Assoc.		\$4,000.00	\$4,155.29
Pacific Nat'l Bank	Nov. 21, 1946	\$ 400.00	\$ 525.79
Bank of America (Los Angeles)	Feb. 24, 1947	\$ 800.00	\$1,120.79
Anglo California (Market-Jones)	Feb. 7, 1946	\$ 610.00	\$ 433.24
Anglo California (Market-Jones)	Aug. 31, 1946	\$ 867.27	0
Bank of America (Arguello-Geary)	May 14, 1947	\$ 500.00	\$2,524.75
Bank of America (Day & night office)	June 5, 1943	\$1,203.14	\$1,867.00
Merrill Lynch (stock brokers)	Feb. 8, 1946	\$1,500.00	\$ 792.10

The amounts stricken out should be disregarded either

(a) because they are in excess of the amounts on hand at the time of the Nevada decree, or

(b) because the evidence does not show that the accounts were in existence at the time of the Nevada decree, or

(c) because they were not on hand or traceable into other assets at the time of Mr. Sidebotham's death, or

(d) they were lower at death than when the accounts were opened.

The total of the accounts properly indentified as to dates and amounts is only \$2,828.48.

The objection to said testimony was that it was hearsay, incompetent, irrelevant, immaterial, no

proper foundation laid and not the best evidence, and it was stated as follows:

“Mr. Trowbridge. All right; pardon me. We will make the same objection to this line of testimony, Your Honor; that it is obviously based on hearsay and incompetent, irrelevant and immaterial and no proper foundation laid. This again is merely a petition for instructions and anyone can see that it is hearsay. It is not in the form of an affidavit as to the particular facts that show in that exhibit but was merely put in there for information by the Administrator so that he can tell the Court what claims he has to meet and what money he needs to investigate these claims. It is obviously hearsay, and we will again make that objection. (Tr. 172)”

It was admitted subject to a motion to strike out. A motion to strike out this testimony was made at the end of the trial and was not acted on by the Court. (Tr. 235-238.)

(g) The Court erred in admitting in evidence over counsel's objection Plaintiff's Exhibit No. 12 (Tr. 168) subject to a motion to strike. A motion to strike out said evidence was made at the end of the trial and it was not acted on by the Court. (Tr. 235-238.) The objection to the admission in evidence of Plaintiff's Exhibit 12 was stated at the trial as follows:

“We will object to that, Your Honor, as being hearsay. The proper foundation isn't laid for it. It is obvious it is a copy of a report of a government agent, and it must be based on hearsay.” Also, that it was “immaterial, irrelevant and incompetent”. (Tr. 168-171.)

CONCLUSION.

The decision in this case must be reversed not only on one single ground, but on many grounds none of which can be overcome by any argument, in spite of the clever and persistent campaign plaintiff and her shrewd lawyer working together have waged *since before 1933* to get a substantial part of Sidebotham's property.

Since the evidence of plaintiff cannot possibly be strengthened on a re-trial we submit that not only should the judgment be reversed but it should be reversed with instructions to the District Court to enter judgment in favor of the defendants.

See

Massachusetts Mutual v. Pistolesi, 160 F. 2d 668, (C.C.A. 9th per Denman);

American Trust Co. v. Dixon, 26 C.A. 2d 426, 438; 78 P. 2d 449, 455.

Dated, San Francisco, California,
September 4, 1956.

Respectfully submitted,

FRANK J. FONTES,

DELGER TROWBRIDGE,

*Attorneys for Appellant W. A. Robison,
as Administrator of the Estate of
Robert Sidebotham, Deceased.*

THEODORE M. MONELL,

*Attorney for Appellants Robert Side-
botham and James Sidebotham.*

No. 15,123

IN THE

United States Court of Appeals
For the Ninth Circuit

W. A. ROBISON, Administrator of the
Estate of Robert Sidebotham, De-
ceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

OPENING BRIEF OF APPELLANTS

W. A. ROBISON, AS ADMINISTRATOR OF THE ESTATE OF
ROBERT RUSSELL SIDEBOTHAM, AND FRANK J. FONTES
AND DELGER TROWBRIDGE ON APPLICATION FOR
ALLOWANCE OF EXPENSES OF DEFENSE.

FRANK J. FONTES,

City Hall, San Francisco 2, California,

DELGER TROWBRIDGE,

819 A Street, San Rafael, California.

Attorneys for Appellant

W. A. Robison as Said

Administrator.

FRANK J. FONTES,

DELGER TROWBRIDGE,

Appellants.

FILED

SEP 27 1956

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
The law	3
Appellant W. A. Robison as administrator is entitled to be awarded all his necessary expenses incurred to defend any assets in his possession formerly belonging to Robert Sidebotham, deceased	3
Conclusion	11

Table of Authorities Cited

Cases	Page
Crump v. Ramish, 86 F. (2d) 362 (9th Circ.)	6
Dingwell v. Seymour, 91 C.A. 483, 267 Pac. 327	8
Eggert v. Pacific States Savings and Loan Association, 53 C.A. (2d) 554, 127 P. (2d) 999	4
Franz v. Buder, 82 F. Supp. 379	6
Managhan v. Hill, 140 F. (2d) 31	6
Metzenbaum v. Metzenbaum, 115 C.A. (2d) 395, 252 P. (2d) 31	7
Spencer's Est., 18 C.A. (2d) 220, 63 P. (2d) 875	7
Sprague v. Ticonic Bank, 307 U.S. 161, 59 S. Ct. 777	6

Texts

90 C.J.S. 399-412	10
Restatement of the Law of Trusts, Volume I, Section 188, page 492	9
Scott on Trusts, (2d ed., 1956), Volume 2, Section 188.4, page 1402	9

No. 15,123

IN THE

**United States Court of Appeals
For the Ninth Circuit**

W. A. ROBISON, Administrator of the
Estate of Robert Sidebotham, De-
ceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

OPENING BRIEF OF APPELLANTS

**W. A. ROBISON, AS ADMINISTRATOR OF THE ESTATE OF
ROBERT RUSSELL SIDEBOTHAM, AND FRANK J. FONTES
AND DELGER TROWBRIDGE ON APPLICATION FOR
ALLOWANCE OF EXPENSES OF DEFENSE.**

This is an appeal from the order of the Honorable District Court denying allowance of expenses of defense dated and filed March 27, 1956 (Tr. 55-56).

The record consists only of the verified petition of W. A. Robison as said administrator and of his attorneys Frank J. Fontes and Delger Trowbridge for allowance of expenses of defense, including attorneys'

fees (Tr. 50-55), which was filed February 27, 1956 and the order denying this petition which was filed on March 27, 1956 (Tr. 55-56). There was no counter-affidavit or evidence produced on behalf of the plaintiff in opposition to the petition, although her attorney made an argument against it (Tr. 255-260). The petition itself, which was verified, contained a full summary of all of the services performed by Frank J. Fontes and Delger Trowbridge as attorneys for W. A. Robison as said administrator, which consisted of the usual steps in defending an action through trial and through settlement of findings to judgment. In paragraph IV W. A. Robison as administrator also stated the moneys which he had spent in defending said action. In paragraph V, the last paragraph, petitioner alleged

“The above entitled action was defended by said Public Administrator through his counsel above named in good faith and on reasonable grounds. The defense of said action was necessary for the proper protection and preservation of the properties and assets of Robert Sidebotham, deceased.” (Tr. 54.)

Since the only opposition to the petition was in the nature of a legal argument, these allegations as well as all of the other allegations in the petition must be taken as true.

THE LAW.

APPELLANT W. A. ROBISON AS ADMINISTRATOR IS ENTITLED TO BE AWARDED ALL HIS NECESSARY EXPENSES INCURRED TO DEFEND ANY ASSETS IN HIS POSSESSION FORMERLY BELONGING TO ROBERT SIDEBOTHAM, DECEASED.

The theory of plaintiff in the action commenced by her is that the assets held by W. A. Robison as administrator were formerly community property of herself and Robert Sidebotham, deceased, and that he is holding a half interest in them now as trustee for her; as a corollary to this she contends that the assets are not properly subject in any way to the jurisdiction of the San Francisco Probate Court and that the District Court could not therefore authorize the spending of any of it for any purpose by the administrator defending this action.

If the judgment is reversed and defendant W. A. Robison as said administrator wins a final judgment in the federal District Court no problem as to the awarding of expenses of defense will ever arise in that Court or in this Court because they will be awarded out of the probate assets being administered by the San Francisco Probate Court. If on the other hand this judgment is affirmed then we respectfully submit this Honorable Court must find that the administrator, who admittedly acted in good faith and reasonably in defending said action in the Court below, must be reimbursed for all his proper expenses, including reasonable attorneys' fees by an order of the District Court below.

Assuming that the administrator is holding the assets in trust, it would make him an involuntary trustee for the benefit of said plaintiff. He would then be in the same position as the State Building and Loan Commissioner was in the case of *Eggert v. Pacific States Savings and Loan Association*, 53 C.A. (2d) 554 at 556 and 558, 127 P. (2d) 999, 1001.

This was an action in equity to declare a trust in certain assets in the hands of the State Building and Loan Commissioner, who had seized the assets of the Pacific States Savings and Loan Association for administration because of its insolvency; it was contended that these were not assets of the Pacific States Savings and Loan Association which claimed title to them by outright purchase, but were assets of the Fidelity Savings and Loan Association (also in liquidation), held in trust for it by the Pacific States Association and that the Building and Loan Commissioner therefore was merely holding them as a trustee for the benefit of the Fidelity investors. The Fidelity investors prevailed in the action on the ground that they were trust assets belonging to Fidelity investors. Since the Building and Loan Commissioner was administering the assets of *both* Pacific States Savings and Loan Association *and* Fidelity Savings and Loan Association he was on both sides of the fence and could not defend the action against the Fidelity Association. In this situation the attorneys for the Pacific States Association took over the defense of the Fidelity Association action. The attorneys representing the Pacific States Savings and Loan As-

sociation, which held all the Fidelity assets when it was seized, were allowed compensation for their services out of the Fidelity assets in the hands of the Building and Loan Commissioner, *even though their defense was not successful.*

In approving the allowance of the attorneys' fee to the attorneys for the Pacific States Savings and Loan Association, as holder of the Fidelity assets when Pacific States was seized, the Court disposed of the argument that the Superior Court had no jurisdiction in the trust suit to allow attorneys' fees to the attorneys for the Pacific States Savings and Loan Association in the following words:

"This proposition is untenable. Appellant (Building and Loan Commissioner) after taking possession of the assets of Fidelity and Pacific States, occupied the status of trustee of the assets of each of said corporations (Evans v. Superior Court, 14 Cal. 2d 563, 673, 96 P. 2d 107), and it was his duty as such trustee to take all reasonable means for the protection of these assets for the benefit of the respective corporations, their stockholders, investment certificate holders, and creditors. Hence, when plaintiff sought to have a trust imposed upon certain assets of the Pacific States, it was appellant's duty to defend against this attempt to impress a lien upon the assets of the trust which he was administering."

"The above entitled action was defended by Pacific States through its counsel of record, the firm of O'Melveny & Myers, in good faith and on reasonable grounds. The defense of said action

was necessary for the proper protection and preservation of the business, properties and assets of Pacific States in the possession of intervener Ralph W. Evans, and said defense inured directly to the benefit of said business, property and assets in the possession of said intervener as Building and Loan Commissioner of the State of California and as well to the benefit of primarily, the creditors and certificate holders of Pacific States and, secondarily, petitioner itself."

The same rule is followed in the federal Courts.

The general subject of allowances for counsel fees out of funds before equity Courts is well discussed by Mr. Justice Frankfurter in *Sprague v. Ticonic Bank*, 307 U.S. 161, 163, 59 S. Ct. 777, 778, where he explained that in many cases equity allows attorneys' fees in order "to do justice".

The Courts have approved such allowances in:

Managhan v. Hill, 140 F. (2d) 31;

Crumpp v. Ramish, 86 F. (2d) 362 (9th Circ.);

Franz v. Buder, 82 F. Supp. 379, 385, where

the learned judge discusses the right of a trustee to be reimbursed for *unsuccessfully* defending a suit in the following language:

"A trustee owes a duty to every conflicting interest, to preserve and safeguard the trust property, equally and for all. Clearly, he will not, and cannot, do this if upon every attack upon his trust, his attitude is to be mellowed by the fear of personal loss by way of attorney's fees, if he yield to demands, whether just or unjust, rather than resort to litigation to protect the trust.

"This action was not brought by, but against the Trustees. True, it has been said that their denial of plaintiff's interest provoked it. This is not unusual. I have referred already to the controlling question in the main action, that is, whether stock dividends were income or corpus. The Trustees owed a duty to the potential creditors of the personal estate of Sophie Franz. True, it happened, so far as I know, or the records show, that these were negligible. (There is, in fact, nothing in the record upon this point.) But such creditors might have been numerous. If they had been numerous, a duty which the Trustees were bound to observe, was owed to them. I am not able to see why a well-settled general rule ought to be whittled away to subserve the exigencies of an abnormal situation. It surely cannot be the law that if the trustees win in litigation against a trust estate, they may have attorney's fees allowed to them, but if they lose, they must pay such fees from their own pockets. Such a rule would be utterly destructive of a public policy, undoubtedly existing.

"The estate in dispute was either put into the hands of the trustees, or it was not. If it was, and litigation arose about it (and both of the above propositions are verities) then I think the Trustees were authorized to hire and pay attorneys to defend its integrity, even though the legal burden was initially on the life tenant to handle, invest and protect and conserve the remainder estate."

The same rule was laid down in the similar case of *Metzenbaum v. Metzenbaum*, 115 C.A. (2d) 395, 399,

252 P. (2d) 31, in which the Court stated the general rule as follows:

“We can conceive of no higher duty resting upon a trustee than that of defending against adverse claims to trust assets. Indeed, failure to do so without sufficient justification would subject the trustee to liability for any loss resulting from such failure upon his part. True, the appellant as liquidating partner, like a trustee who is also a beneficiary of the trust, derived some personal benefit in successfully defending against the adverse claims to the partnership assets in question, as thereby his proportionate share of the net assets remaining after the payment of debts was increased. This, however, is but a fortuitous circumstance resulting from the performance of a fiduciary duty which he owed to the trust, and whereby valuable assets were preserved for the benefit of all persons interested therein, including the respondent. While respondent protests vigorously against any allowance to appellant in reimbursement of the attorneys’ fees incurred in the defense of the dissolved firm’s title to the royalties in question, we have no doubt that, if such a claim had been advanced by persons other than members of his own family with his consent and active cooperation, he would have been the first to complain of appellant’s failure to defend against the same. Hence, we conclude that the trial court erred in its ruling that appellant was not entitled to reimbursement for attorneys’ fees in a reasonable amount incurred by him in the defense of the Fanchon suit.” (Italics ours throughout.)

See also *Spencer’s Est.*, 18 C.A. (2d) 220, 222, 63 P. (2d) 875; *Dingwell v. Seymour*, 91 C.A. 483, 513,

267 Pac. 327, in which the counsel who conscientiously represented the trustee *unsuccessfully* were allowed reasonable attorneys' fees for their services *out of the trust assets*. The ruling of the Court is well stated in official headnote 16 as follows:

"Where the special administrator of the estate of the trustor, by an action to quiet title as against said individual trustees, undertook to obtain all the property of the trust for the heirs and estate of the trustor, such action was not for the benefit of the trust, and the trial court should not have allowed him an attorney's fee; but in such action it was the duty of both the individual trustees and the corporate trustee to defend and maintain their respective trusts when attacked, and where they participated in the action in good faith and in compliance with such duty, an attorney's fee was properly allowable to both the individual trustees and the corporate trustee, *even though the corporate trust was void and without force* by reason of the priority and validity of the other trust."

This rule is well stated in Volume I of the Restatement of the Law of Trusts, section 188, at page 492, as follows:

"The trustee can properly incur expenses for costs in maintaining or *defending* an action in the proper administration of the trust *even though he is unsuccessful in the action*."

See also Vol. 2 of Scott on Trusts (2d ed., 1956), page 1402, section 188.4 as follows:

"The trustee owes a duty to the beneficiaries to take reasonable steps to realize on claims which

he holds in trust, and to resist claims which may result in a loss to the trust estate.

Even though the trustee is unsuccessful in the litigation, he is entitled to charge the estate with the necessary expenses, if he was not himself at fault in causing the litigation."

90 C.J.S. 399-412.

The main ground apparently of the ruling of the Honorable District Court was that the expenses of the defense, including the attorneys' fees should be allowed by the Probate Court of San Francisco and paid out of the assets remaining in the Public Administrator's hands after the judgment in this case was satisfied (Tr. 257-260). The effect of such a ruling is to throw the expenses of defending this action entirely on the half of the estate *which was not before this Court* and to leave half of the assets, i.e. the fund in this litigation, into which the administrator was brought by service of process involuntarily, *free and clear of any liability* for his expenses of defending the action. This seems to appellants to be a highly unjust, unfair and inequitable result, not justified by any authority.

CONCLUSION.

It is our contention that based on the facts and the cases which we have cited, this Court should make an order reversing the order denying the petition for the allowance of the expenses of the defense of the action to said administrator and should direct the Honorable District Court to make findings as to whether this action was defended in good faith and whether it was reasonably necessary. If such findings are made by the Honorable District Court, then the Honorable District Court should be directed to ascertain the actual cash expenses paid by the Public Administrator in connection with the defense of this action, including the expenses of preparing the record and briefs in this Court, and to award also any other proper items of expense such as attorneys' fees in a reasonable amount to said administrator.

Dated September 10, 1956.

Respectfully submitted,

FRANK J. FONTES,

DELGER TROWBRIDGE,

Attorneys for Appellant

W. A. Robison as Said

Administrator.

FRANK J. FONTES,

DELGER TROWBRIDGE,

Appellants.

No. 15123

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. A. ROBISON, Administrator of the Estate of Robert
Sidebotham, deceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLEE'S BRIEF.

MANUEL RUIZ, JR.,

704 South Spring Street,
Los Angeles 14, California,

*Attorney for Appellee,
Helene Marceau Sidebotham.*

FILED

NOV 29 1956

PAUL P. O'BRIEN, C



TOPICAL INDEX

	PAGE
Response to appellants' argument.....	1
Tracing of assets.....	6
Was evidence inherently improbable?.....	6
The law	7
The decree of heirship.....	11
The District Court considered the Wyoming decree void.....	14
Laches and estoppel.....	18
Miscellaneous rulings on evidence.....	20
Appeal from lower court's refusal to allow expenses of defense....	25

TABLE OF AUTHORITIES CITED

CASES	PAGE
Champion v. Wood, 79 Cal. 17.....	18, 19, 20
Clarke v. Shoshoni Lumber Co., 224 Pac. 845.....	17
Davis v. Johnson, 144 F. 2d 862.....	16
Delonoy v. Delonoy, 216 Cal. 27.....	15
Dodge, Estate of, 9 Cal. App. 2d 650.....	14
Doyle v. Hampton, 159 Cal. 729.....	16
Hume v. Ricketts, 240 P. 2d 881.....	17
Jones Truck Co. v. Superior Oil Co., 234 P. 2d 802.....	16
Lynn, Estate of, 109 Cal. App. 2d 468.....	13
Overstein v. Overstein, 228 S. W. 2d 615.....	16
Schlyen v. Schlyen, 43 Cal. 2d 361.....	12, 13
Stern v. Judson, 163 Cal. 726.....	16
Tarien v. Phil C. Katz, 216 Cal. 554.....	20
White v. White, 26 Cal. App. 2d 524.....	9
Williams v. Williams, 57 Cal. App. 36.....	16
Wilson v. Superior Court, 101 Cal. App. 2d 592.....	14

STATUTES

Probate Code, Sec. 1080.....	11, 12, 13
Probate Code, Sec. 1088.....	11
Wyoming Compiled Statutes (1920), Sec. 5924.....	17
Wyoming Compiled Statutes (1945), Sec. 3-1009.....	16

No. 15123

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, deceased, ROBERT SIDEBOTHAM and JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLEE'S BRIEF.

Response to Appellants' Argument.

Decedent and Appellee were married from 1928 to 1946. Decedent's successor, the Administrator of his estate, has in this appeal, written by way of an opening brief and under the caption of "Argument", a lamentation, referred to as "laches" and "estoppel" with reference to the turbulent portions of the married life of the parties. Neither laches nor estoppel change the character of community property. Nowhere in the community property law is it related that married couples only, who did not fight with one another, accumulate community property. For married persons to accumulate community property, they need only be married, and the fact that

they may have had pre-marital sexual intercourse, and after the marriage fought, or threatened each other, misconducted themselves as to one another, or separated and become reconciled, doesn't change community property to separate property.

Appellee's Exhibit 2 in evidence shows that there were sweet honeyed periods of time as well in the marriage of the parties. Said exhibit under the signature of decedent is illuminating. Neither a long array of acts of connubial happiness nor connubial unhappiness would assist this Court whatsoever, in determining the nature of the property accumulated during the marriage.

But, Mrs. Sidebotham was an "unhappy wife", complain the Appellants, and her testimony before the trial court was inherently improbable, because she has insisted she was happy in her marriage to Decedent. An exposition of the inherent improbability of a female being happy with a blustering caveman egomaniac, may seem incredulous to counsel for Appellants, but the vagaries of the feminine heart and the reason she may not be happy but in fact "bored" by a sweet, kind, attentive husband, is a subject which the most profound students of psychology have never been able to determine.

Appellants claim that Appellee forfeited her right to her undivided interest in the community property or is estopped to claim that community property is community property is based upon the supposition that she was an adventurous in that she waited until he died, and then for the first time asserted her rights in and to the accumulated community property. Appellants assert that she further forfeited her right to her community interest in the property because she at one time, many years be-

fore his death, purportedly extorted an agreement out of him for 10% of a deal, and because she contemplated a divorce and deigned to write a letter to the Decedent's first divorced wife on the unspeakable subject of "alimony". Since alimony simply means "support and maintenance" to which either spouse may be entitled to receive under the law, its contemplation by a wife or husband, can hardly of itself place the label of "adventurous" upon said spouse, nor make the proposed solicitant thereof an unsavory character.

Appellants do not contend however, nor did the evidence show, that the Decedent ever did in fact pay Appellee any alimony, in over 20 years of the marriage. Appellants further do not contend, nor did the evidence show, that Appellee ever succeeded in getting 10% or any percent whatever, of any deal which Decedent may have made with her.

Appellants have further claimed in their opening brief under their caption of "Argument" that Appellee is estopped from asserting her property rights because she could never have been misled by her deceased husband, and that accordingly she ought to have known that he had his money and property hidden, because she was not ignorant of Court proceedings and property settlements in that she had once sued him for separate maintenance in the year 1932. It is submitted that one brief judicial experience could hardly have qualified her to become an expert on legal matters or the discovery of hidden assets. Nor would the fact that she wrote a letter in the year 1932, to her husband's former wife, in which she very properly inquired as to whether said former wife was being paid alimony, place her into the classification of a

conniving, avaricious spouse. The payment of alimony to another woman is always a source of slight discomfiture to the spouse of a husband who is burdened with such type of "fixed charge"! The inquiry made was a natural one which the ordinary reasonable woman would be wont to make.

The contents of said letter (App. Br. p. 9) in no manner qualified her as a person who was an expert on provisos contained in settlement agreements often times proposed by "hard bargainers".

Appellants further contend in their opening brief that Appellee was acquainted with "business affairs". The evidence is, that she knew shortly after she married her husband and some 10 to 15 years before he died, that her husband had 4 offices, that she knew how to answer the telephone, at one of said offices, knew how to open envelopes, address envelopes and put stamps on said envelopes. In many modern offices these duties are handled by automatic machines without "brains" and the fact that Appellee knew how to do these things didn't qualify her as an expert in the business affairs of her husband.

Appellants further contend that since under the same caption of "Argument" that Appellee, preferred to be "employed" when she could find employment rather than starve, that she being "employed" implied extra intelligence and proved that she could have discovered that the decedent later owned a parcel of real estate in San Francisco, inclusive of the fact that decedent was a registered Democrat. The evidence showed that Appellee was employed for a period of time as a real estate saleslady. Nothing in the nature of her duties, which was to contact prospective buyers of real estate, ever required

her to search official records. Appellant's counsel carefully refrained from questioning Appellee as to whether she knew where such records could in fact be found or located.

Since the Appellee was not a judgment creditor of the decedent, and under the state of the record prior to the institution of the case at bar, said decedent ostensibly owed her nothing, excepting the sum of \$100.00, there was no legal requirement that she exercise diligence in locating such assets as he might possess. To what avail would she be required to learn that in 1950 the decedent acquired a parcel of real estate in San Francisco, and that it appeared on the tax rolls in his name, when she herself had divorced the decedent in 1946, without she having sought any alimony nor know that he had accumulated obviously concealed assets prior thereto!

How would the fact that the decedent was a registered voter in San Francisco from 1942 to 1950, be indicative that he was concealing monies under names other than his true name, and other than the name he used as a registered voter prior to the date that Appellee divorced him, and continued to conceal the same under aliases thereafter? How would the fact that there was a telephone, in someone else's name at the address where he registered as a voter, from 1945 to 1950, place Appellee upon the trial of hidden assets or constitute suspicious circumstance pointing to the fact that decedent had been hiding assets from her as of prior to the year 1946? She was not a judgment creditor.

Tracing of Assets.

Appellants have contended that the evidence was insufficient to support the findings of the lower court, that there was community property of the parties in existence prior to the year 1946 (pp. 17-19).

Appellants have failed utterly to point out by any reference to the evidence, wherein the same was insufficient to support the findings or what illegal inferences were drawn therefrom by the trial court.

Appellants devoted less than two pages of argument in their brief, to this point (pp. 17-19) and have sought to cast the burden upon the Appellate Court, to search the record, with a fine tooth comb in order to come up with specifications wherein and whereby the trial court must have, as a matter of law drawn improper inferences, or considered nonapplicable presumptions or ignored the obvious. None of this labor has been performed by Appellants, or else if the same has been done, it has not been made a part of Appellants' brief for lack of merit.

Was Evidence Inherently Improbable?

Appellants have argued on two pages (19-21) of their brief that the decision of the trial court, ought be reversed, because of the "obvious falsity and inherent improbability of plaintiff's case".

Since the case as such cannot be false or inherently improbable, in view of the sweeping statement or claim of Appellants, we have searched said two pages to ascertain what specific portions of the transcript of the evidence, are referred to, which are obviously false and inherently improbable.

There is no inherently improbable testimony as the term is known in law, excepting the argument that Appellants themselves didn't believe the evidence given by Appellee concerning her "reliance" upon the representations made to her by Decedent that he was "broke" and "had a hard time."

The province of the "trial court" relative to whether a witness is "credible", and if credible the extent and "weight" to be given his testimony, is never invaded by the Appellate Tribunal, and therefore not a proper point for appeal. Nor does the label which Appellants wish to place upon the argument that the testimony is "inherently improbable", change the rule that the question of credibility and credulity rests entirely within the discretion of the trial court, unless in fact the evidence is inherently improbable and the trial court arbitrarily, and capriciously, and whimsically, has abused its discretion.

A search of said two pages for specifications of and concerning the arbitrary exercise of power, and how and in what manner the trial court was capricious and whimsical, in giving probative value to scientifically or legally inherently improbable evidence, fails to divulge any such specifications.

The Law.

Under subheading I of "The Law" at page 22 of their opening brief, Appellants have made reference to a prior decision of this Honorable Appellate Court, wherein it was held that Appellee in her pleadings in the case at bar had stated a cause of action against Appellants. Appellants state in substance, that said Appellate Court's decision doesn't mean anything in the case at bar, because the lower court tried the case on evidence which was com-

pletely different from the allegations of the pleadings. Appellants however do not support their conclusion by reference to the evidence which supports said contention. Throughout the course of the trial and in the Reporter's Transcript of the evidence, not a single objection appears to the effect that any proof was offered at variance with the pleadings.

A further contention made by Appellants in their opening brief, is that the Appellee failed to prove that the property possessed by decedent when he died, was the same property he had in 1946, and under subheading II, from pages 23-27, quote law upon the subject. Appellee has no quarrel with Appellants concerning law which may apply, but it is a truism that the "facts" control what law may become applicable.

When the trial court found affirmatively and upon evidence duly introduced and received that the property found in the possession of decedent at the time of his death, had been acquired by him prior to the year 1947, during his marriage with Appellee, any rebuttable presumption to the contrary set at rest the contention raised on appeal that in view of the fact that more than four years had lapsed thereafter, the decedent's property had thereby converted into his separate property.

The administrator of Appellant Estate, according to the evidence, had retained the services of William Dolge and Company, licensed accountants and investigators, to reconstruct the books of account of the decedent subsequent to the year 1946, and the results of that investigation as hereinafter indicated were available to Appellants for presentation into evidence.

Mr. Trowbridge, attorney for the Appellant, was vehement in his opposition to the introduction of such evi-

dence at the trial. Appellee's effort to place into evidence that decedent accumulated no material or substantial assets subsequent to 1946 was thus obstructed [Clk. Tr. pp. 204-206]. The attorney for Appellants, Mr. Trowbridge, refused to allow said Investigator to testify at the time of the trial, on the grounds that the results of the labors made by said investigators concerning what decedent may have accumulated after 1946, constituted privileged communications.

May Appellants now on this appeal, be permitted to take advantage of the alleged omission of the very evidence which they themselves caused to be excluded from evidence at the time of trial?

When evidence is hidden and not produced by the party who has the same in his control, can said party avert the consequences of his own deliberate act and complain, if the trial court concluded that said evidence, if produced, would have been adverse to said party, particularly if there was other evidence from which it could likewise be clearly inferred that the property on hand when the marriage was dissolved in 1946, was the same property or increase thereof that decedent had at time of his death?

In the California case of *White v. White*, 26 Cal. App. 2d 524, it was held that when a husband suppressed records in a matter involving a community property accounting with his wife, that he had to take the legal consequences of being unable to account satisfactorily therefore—and a presumption arose that the suppression, would have been adverse, if it had been produced.

The suppression of evidence was made evident during the examination of Mr. Frank J. Fontes, attorney for the estate, who had testified that William Dolge & Com-

pany, certified public accountants, had been retained to make an investigation of the assets of decedent [Rep. Tr. p. 159, *infra, et seq.*]:

“Q. Now, on the question of the time when the monies which went to make up the assets of the decedent, were accumulated, did William Dolge & Company, certified public accountants, render a report to you. A. Yes.

Q. Do you have that report with you? A. I had a copy.

Q. May I see the copy? A. I think I delivered that to Mr. Trowbridge.

Mr. Trowbridge: Yes, I have it here, and it is addressed to me. I think it is a privileged communication that counsel is not entitled to.”

Continuing with Mr. Fontes testimony, the following occurred [Rep. Tr. p. 162]:

“Q. As administrator of the estate, have you any evidence that the decedent did file a report wherein he reported income received or earned by him for the years 1946 to the date up to and including the year 1950? A. Not for 1946, or anything after that. . . .”

The trial court drew proper and logical inferences, from the evidence, concerning when the property may have been accumulated by Decedent. Thus, the bills found in decedent's safety deposit box in 1951, were alongside other papers, assets, stock certificates, and savings bonds which bore dates prior to 1946 and as early as the year 1932, and had obviously been acquired by the decedent during the marriage with Appellee [see Memo. opinion, Rep. Tr. p. 37, for references to other portions of the evidence and which appears as findings of fact].

The Decree of Heirship.

Appellants have claimed that a decree of the Probate Court dated December 14, 1953, to establish heirship, under Probate Code, Section 1088, constitutes *res adjudicata* of the rights of the Appellee in the case at bar and that therefore, there was nothing left for the district court below, to pass on. An examination of said decree shows that said decree went no further than to adjudicate who are the legal heirs of the decedent, and entitled to distribution [Rep. Tr. pp. 64-65]. It was never claimed in this action before the district court below by the Appellee, that she is the widow of the decedent, nor has it ever been claimed herein, that Appellee is an heir or a legatee of the Decedent. Nor is it claimed by Appellee that she is entitled to a decree of distribution from the estate. Appellee at one time had two matters pending in the Superior Court at the same time, to-wit: the case at bar, later moved to the Federal Court, and the petition in probate referred to by Appellants. Both however proceeded on a different basis and of and concerning a different subject matter. The said Petition in Probate involved the question of succession, all of which subject matter is not involved whatsoever in the case at bar. Appellee at one time mistakenly made a petition under Probate Code, Section 1080, before the State Probate Court in the capacity of distributee, which capacity is to be distinguished from the capacity of Appellee in the case at bar. The classification of subject matter and the parties in said separate proceedings are and were never the same. Appellee, upon having ascertained that she was not legally an heir, therefore abandoned her petition under Probate Code, Section 1080, before said Probate Court, and did not press it further. She was

not present in Court nor was there ever a trial of said disconnected issue on the merits. The probate decree went no further than simply establish heirship, and denied Appellee's petition for distribution as an heir. The finding by the Probate Court that Appellee was not an heir was not only a true fact, but likewise is consistent with her acclaimed status and position in the case at bar, to-wit: that she was by virtue of prior divorce, a stranger to the decedent and his estate. The two proceedings were inconsistent, nor does the principle of *res adjudicata* apply.

For Appellants to assert that the issues involved in the "heirship proceedings" [the petition therein of Appellee was three pages long, Rep. Tr. pp. 61-63] are substantially the same as the issues involved in the action at bar [complaint of Appellee was fourteen pages long, Rep. Tr. pp. 3-16] in which latter action Appellee made the Public Administrator an adverse party defendant, instead of being in privity with said Administrator as in the former Petition, concerns another matter. To assert they are the same is to ignore or fail to understand the fundamentally different nature of said proceedings which pursue entirely different objectives, and constitute different classes of cases, as well as treat of different subject matters.

In the case of *Schlyen v. Schlyen*, 43 Cal. 2d 361, cited by Appellants in support of the argument that the Probate Court had jurisdiction to decide under Probate Code, Section 1080, adverse title to property in course of administration, was a case, the effect of which was argued before the trial court, and said trial court specifically disagreed, even as this Appellate Court will disagree, with the interpretation placed thereon by Appellants. See memorandum opinion [Rep. Tr. pp. 39-40]. In the

Schlyen case the probate jurisdiction of the Superior Court did not try the issues, but instead, the issues were tried by the Superior Court sitting in the exercise of its general equity jurisdiction, even as in the case at bar, which case was moved for trial upon motion of the Appellants to the United States District Court.

The *Schlyen* case involved the rights of parties in privity with the estate, and did not involve the rights of third party strangers. It stated that matters which may be tried in Probate Court, may be tried in a court of general jurisdiction, by waiver, but that matters which must be tried in a court of general jurisdiction, and not prohibited to the Probate Court, or Superior Court sitting in probate, such as claims of title between the estate and strangers, cannot be tried in a Probate Court or department.

Appellee, in said petition under Probate Code, Section 1080, which she later abandoned, stated in paragraph IV thereof [Rep. Tr. p. 62], that she was an "heir at law" of decedent. In paragraph VI thereof [Rep. Tr. p. 63] petitioner said she was entitled to the property by virtue of the "death" of decedent.

Appellants assertion that the same issues were involved in the heirship proceedings and in the case at bar, are accordingly incorrect, since heirship or distribution is not involved whatsoever in the case at bar.

The only parties who may be classified as aggrieved parties in an heirship proceedings are legatees and devisees styled "claimants" Probate code section 1080. No issue can be raised in the proceedings by another.

Estate of Lynn, 109 Cal. App. 2d 468, 494.

It is a special proceedings for those who claim in privity with the estate only.

Estate of Dodge, 9 Cal. App. 2d 650.

The Probate Court is without jurisdiction to try title to property as between a representative of the estate and a stranger thereto.

Wilson v. Superior Court, 101 Cal. App. 2d 592.

Since therefore, the issues and subject matter, and the parties, in the case at bar, are totally different than those under the petition to determine heirship at one time filed and abandoned by Appellee, the rules concerning *res adjudicata* are not involved.

It is interesting to note that the petition in probate, referred to by Appellants and the complaint originally filed by Appellee in the case at bar, which was removed to the United States District Court, and being the instant case on appeal, were pending in the Superior Court of San Francisco at the same time. The actions covered different subject matters, and were not subject to consolidation.

The District Court Considered the Wyoming Decree Void.

The Wyoming decree procured by decedent November 2, 1942, did not purport to dispose of any property rights between the spouses, and therefore decided nothing concerning the same.

The matrimonial domicile of the parties was the State of California. Appellee did not participate therein, know about the same, or file an appearance therein. The evidence was clear that the parties after their marriage in 1928, lived in the State of California, and lived in no other state, as husband and wife; and that the decedent

was living separate and apart from appellee, without her fault, at the time that he procured said Wyoming decree, on substituted service.

The evidence was uncontradicted, that when the decedent procured his divorce in Wyoming, he stated under oath, that the residence of the appellee was

“unknown and cannot, with reasonable diligence be ascertained.”

He therefore committed a fraud upon the Wyoming Court, and upon the appellee, his wife. The testimony of the witness Mr. Scardino [Rep. Tr. p. 206, *et al.*], whose parents owned the hotel where the plaintiff resided in San Francisco, and where decedent had been visiting her in the year 1940, and paid the rent, corroborated plaintiff's testimony to the same effect.

[The decree of divorce, Deft. Ex. E, shows that it was procured on November 2, 1940, not as stated by appellants on November 2, 1942.]

Obviously the very heart of the affidavit in support of substituted service, was predicated upon the flagrantly fraudulent misrepresentation to the Wyoming Court, that she could not be notified in that he did not know where she resided.

California Courts refuse to recognize such type of foreign decree, when the status of its own residents, are involved.

A decree of divorce rendered by a sister state which did not have personal jurisdiction of the defendant, and which was not the state where the parties last lived together as husband and wife, is not entitled to full faith and credit.

Delonoy v. Delonoy, 216 Cal. 27.

A fraud committed against the state granting the divorce makes the decree invalid.

Overstein v. Overstein, 228 S. W. 2d 615.

When a false affidavit is presented to the Court for the purpose of obtaining an order for publication, this, of itself, is an act of fraud both upon the Court and the defendant in the action, and any judgment based thereon will be set aside at the defendant's instance.

Stern v. Judson, 163 Cal. 726;

Doyle v. Hampton, 159 Cal. 729;

Williams v. Williams, 57 Cal. App. 36.

The *Davis v. Johnson*, 144 F. 2d 862 case, cited by Appellant, under the heading that the District Court erred in not giving full faith and credit to the Wyoming decree, is a case wherein upon a petition for writ of habeas corpus, the petitioner tried to question for the second time, a factual issue of jurisdiction, wherein he had been a defendant in a criminal action, and had been found guilty and sentenced to Alcatraz. Appellee believes that this authority cited by Appellant, was unintentional as Appellants must have had another rule of law for some other purpose in mind.

The *Jones Truck Co. v. Superior Oil Co.* case, cited by Appellant (234 P. 2d 802), is likewise out of context with the point for which it was offered. A summons on an action, on a promissory note, was left with the defendant's wife at "his usual place of residence", which is specifically provided for by Section 3-1009 of the Wyo. Comp. St. 1945. The Sheriff made a defective return. The Court held that it was the fact of service and not the proof of service that conferred jurisdiction. The

Court made it clear that there was a distinction between a defective service of process from what would constitute lack of service.

Nor do the other cases cited by Appellant change the fundamental rule above stated by Appellee. Thus, the case of *Clarke v. Shoshoni Lumber Co.*, 224 Pac. 845, which Appellant refers to as being similar to the facts in the case at bar, is very dissimilar. No issue whatsoever was made in said Wyoming case, nor was it claimed that any fraudulent or untruthful statement was ever made to the Court, as in the case at bar. Said Wyoming case does not involve a divorce, or a case wherein the *res* and the defendant were outside of the State of Wyoming, as in the case at bar, but involved a default judgment against an "unknown" holder of bonds, in connection with a lien foreclosure. Said Wyoming case involved a motion to "vacate a default judgment" by one Ella R. Clarke, who made a general appearance to do so. The Court held upon conflicting affidavits that she had had *actual notice* of the action within three years from the date of judgment and therefore had lost her right to open said judgment, under the provisions of Section 5924, Wyo. C. S. 1920.

The *Hume v. Ricketts* case, 240 P. 2d 881, cited by Appellant, simply repeats, the general doctrine that an attack upon a Judgment by the defendant in an action on the judgment is generally regarded as a collateral attack, and when absence of jurisdiction over the parties does not appear on the record a collateral attack should not be permitted. The case involved revivor of a judgment wherein the parties had personally litigated the same on the merits.

It was not a divorce judgment where the *res* was without the Court's jurisdiction, or one wherein the defendant had not appeared, as in the case at bar.

Constructive service was had in said revivor action. The judgment debtor attempted to avoid the binding effect of the judgment on the grounds that he ought to have been personally served. The Court held that he could be constructively served. It was never contended that any fraud had been perpetrated on the Wyoming Court or on the attacking party, as appellee has urged in the case at bar.

Laches and Estoppel.

Appellants have claimed in their opening brief, chapter V, page 37, that the lower court erred in not holding that her action was barred both by laches and by the doctrine of equitable estoppel.

It is claimed in Appellants' Opening Brief, that the case of *Champion v. Wood*, 79 Cal. 17, is decisive, Appellants have asserted that from a studied analysis of the same, that the "facts . . . are parallel to those in the present case . . ." Appellants further claim that the opinion of the state court "is particularly strong . . . because it was decided that the complaint was insufficient as against a general demurrer."

Appellee must therefore hasten, to add, in response thereto, that the complaint of appellee has already been held sufficient as against the objections thereto by Appellants, by direction of this Honorable Court. An excellent discussion of the law, and particular references to the facts pleaded in the case at bar, appears in a decision of the

Ninth Circuit Court of Appeals, and reported at 216 F. 2d 816, which is subject to the judicial notice of this Court.

An examination of the *Champion v. Wood* case, cited by Appellants indicates that the facts are dissimilar, and with due respect to Appellants' claim, the applicable law does not appertain.

In said case, a wife inserted in her complaint for divorce, that there was no common property, by reason of certain false and fraudulent representations of her husband. Her husband told her that all of the property acquired by him since their marriage was his sole and separate property, and that she believed him. This was a misrepresentation of law, decided the court. None of the facts of the actual existence of property were concealed from the wife, and the wife in fact had knowledge of the existence of the property acquired during the marriage.

Said the Court:

"It is not claimed in the complaint that any misrepresentations were made as to the amount of property which had been acquired during the marriage. They were misrepresentations as to the rights of the parties with respect to the property,—misrepresentations of law."

The extent of the property was therefore known by both parties, and the subject matter open to the inspection and available to both of them.

In the case at bar, Appellee did not know of the existence of the property or subject matter, and the active concealment of its very existence by the decedent caused her to "discover that it existed" by the accident of decedent's death. Any consultation prior to the discovery

of the concealed assets, with a lawyer, under the facts of the case, would not have led to anything, unless the lawyer had associated with him a clairvoyant who could see what an ordinary human being was incapable of seeing!

The case of *Tarien v. Phil C. Katz*, 216 Cal. 554, is more similar to the case at bar than the *Champion* case (*supra*). The decedent was a gambler. His wife had divorced him. When he died property was found in his possession. She claimed the property was formerly community property and the Court awarded her one-half of the property, because they became tenants in common. The Attorneys for Mr. Katz, the public administrator, attempted to interpose the defense of laches, and failed because said the Court at page 559, *infra*:

“There was no evidence that the wife knew where the common property could be found.”

Miscellaneous Rulings on Evidence.

The witness Mr. Daniel J. Byrne, manager of the safe deposit vaults, Savings Union Branch, American Trust Company, identified certain safe deposit rental or lease agreements, which constituted bank records, of and concerning the safety box held under the name of W. H. Towner. The original safety deposit box was opened on January 9, 1943 and was thereafter continuously carried under the same name until the death of the decedent in 1951.

Although Appellants do not contend that the decedent Robert Sidebotham was a person other than the same Mr. W. H. Towner who had maintained said safety deposit boxes commencing January 9, 1943, up to the time

of his death, they claim that this matter was established by hearsay, was immaterial and incompetent evidence and that no proper foundation was laid which would qualify Mr. Byrne, to identify the admissibility of the records. That accordingly, the District Court committed error, in refusing to strike said evidence, upon motion of Appellants.

An examination of the Reporter's Transcript shows that the evidence was properly admitted and the objections interposed by Appellants are without substance.

Appellants' objections (a) and (b), pages 42-43, without showing of any prejudice suffered by the admissibility of said evidence [Pltf. Exs. 6-7] assert that one Mr. Byrne was not qualified to identify certain records which had been turned over to him in the year 1944, as manager of the safe deposit vaults of the American Trust Company successor to the Security Safety Deposit Company.

Mr. Byrne however testified that he was the manager of the safety deposit vaults of the American Trust Company [Rep. Tr. IV, p. 129, lines 31-32]. That he had supervision of the safety deposit vaults, which boxes had records of the persons who rented them. That he brought the records with him and they were records he maintained under his supervision [Rep. Tr. p. 130]. That he had been employed at the bank for 43 years [Rep. Tr. p. 131, lines 31-32]. That he had personally seen Mr. Towner and had "waited on him quite a bit" [Rep. Tr. p. 141, lines 24-25]. That a young man by the name of Sidebotham had gone to him, showed him a picture of the decedent Sidebotham.

"Q. Did he say that was his father's photograph?

A. Yes.

Q. And this photograph was the same man that had been signing under the name of Towner? A. That is correct.

Q. And the one that you had always been seeing there? A. Yes.” [Rep. Tr. p. 142, *infra*].

The witness then stated that Mr. Katz (decedent’s administrator) took the contents of the box and that it was examined by the “Inheritance Tax Man.”

The evidence is clear that the safety deposit boxes taken out or rented by the decedent after September 8, 1944 [Rep. Tr. p. 128, line 32] were boxes under the control and supervision of this witness. He testified that he made a list of the number of times the decedent entered his boxes since 1944 up until “he passed away” [Rep. Tr. p. 145, lines 1-11].

Prior to the time that Mr. Towner (the decedent Sidebotham) had rented a safety deposit box at the American Trust Company, in the department under the charge and supervision of Mr. Byrne, he had rented a safety deposit box which bore number 1861 on January 9, 1943 from the Security Safe Deposit Company located at 26 O’Farrell Street. On April 24, 1944, he extended the rental on the identical box [Rep. Tr. p. 135, lines 1-12]. All of the assets of said bank were taken over by the American Trust Company, including the safety deposit boxes, on September 8, 1944, as well as the official bank records pertaining to said safety deposit boxes [Rep. Tr. p. 129, lines 1-8]. The same vault number was continued as it had been under the prior bank when Mr. Byrne took charge [Rep. Tr. p. 130, lines 1-20] on September 8, 1944. This occurred more than seven years before Mr. Sidebotham died in the month of December 1951.

Appellants' objection (c), page 45, identification of the signature of Mr. Jones on Plaintiffs' Exhibit 6, and identified as the man who "ran that vault" prior to the time that Mr. Byrne did, is an objection without any prejudicial consequence.

Appellants' objection (e), page 46, of Appellants' Opening Brief refers to the card signed by decedent which identified W. H. Towner as the renter of safety deposit box A-1917 [Rep. Tr. p. 140] on The Savings Union office, of the American Trust Company [Rep. Tr. p. 140, lines 13-32; Pltf. Ex. 9]. Since Mr. Byrne was the manager of the safety deposit vaults of the American Trust Company, and had supervision of the same, and the records of the persons who rented them, the "running objection" made on the record no longer could or did apply to the admissibility of this admissible evidence. The personal representative of the decedent testified that \$64,770.00 in currency was taken out of the safety deposit box in the American Trust Company, and constituted part of the inventory of the Estate [Rep. Tr. p. 152, lines 25-30].

Appellants' objection (f) of Appellants' Opening Brief referred to evidence which was admitted by the Court as constituting part of the decedents inventory and the Court properly admitted it for that purpose [Rep. Tr. p. 173, lines 28-32].

Appellants' objection (g) of Appellants' Opening Brief concerns a registered letter which appears in a petition for instructions filed by the personal representative of the decedent on April 21, 1953 of and concerning a copy of an Internal Revenue Report [Rep. Tr. p. 161, lines 26-32]. Mr. Fontes, Attorney for the personal representa-

tive of the decedent, in charge of administering the assets of the decedent [Rep. Tr. p. 149, lines 26-32] testified that he had no evidence to show that a declaration of the receipt of income had been made by the decedent for the years 1946 to 1950 [Rep. Tr. p. 162, lines 8-15]. He further testified that William Dolge & Company was paid \$1500.00 to ascertain whether decedents assets were accumulated after 1946 [Rep. Tr. p. 160, lines 26-32].

“Q. Is it not a fact that on February 11th, 1953, you petitioned for instructions to incur expenditures for the specific purpose of investigating when Mr. Sidebotham earned or received monies. A. We did file petitions on more than one occasion.” [Rep. Tr. p. 157].

See also [Rep. Tr. p. 212, lines 9-24].

As heretofore related the evidenced marshaled by these investigators was suppressed by Appellants at the trial of the action.

Appellants objected to the admissibility of Plaintiffs' Exhibit 12. Said exhibit indicates that the Bureau of Internal Revenue, had taken an administrative step based upon the same actual facts which were developed in evidence. Under the state of the evidence the Court presumed that by not making any income tax reports between 1946 through 1950, the decedent obeyed the law; that he didn't make any more income than the Administrator of the decedents estate reported. The Administrator asked for authority to contest the claim of the Government, that the decedent had made more income than reported, and thereby appeared on record asserting that the decedent had obeyed the law and had not committed a crime. Said evidence was pertinent, particularly

since Appellants stipulated that decedent had been active on oil and gas lease transactions before the year 1946 from which he could have derived income [Rep. Tr. p. 224, lines 17-23]. The evidence showed that the decedent had engaged in business activities before 1946, but there was an absence of evidence as to whether he had engaged in business activities after the year 1946.

Appeal From Lower Court's Refusal to Allow Expenses of Defense.

Application for allowance of attorneys fees and expenses of counsel and the administrator of the decedent's estate, was denied by the lower court, and an appeal has been taken therefrom. Appellee will consider the same as an adjunct hereto, without the filing of an independent and separate booklet, since it is felt that the same may be summarily disposed of.

The objections made by Appellee against the reimbursement of the legal expenses which appear at page 54 of the Reporter's Transcript, concerns a matter which ought to be covered in the phase of the case concerning the taxing of costs against the party who may ultimately lose the case and not by this appellate tribunal.

As to the attorney's fees, Appellee argued that most of the services rendered by the attorney's in connection with the case at bar had theretofore been paid for upon application to the Probate Court, for the same, excepting such proportion as might strictly be applied to the trial of the action in the Court below. The nature of the argument against the granting of the same, was a matter which was collateral to the case in chief, and no counter-affidavit was filed by Appellee.

The lower court accordingly, thought it best, that the same be disposed of by the Probate Court, which Court had all of the facts before it, and which facts were not offered into evidence by either of the parties in the pending litigation.

Wherefore Appellee, prays that the judgment of the lower court be affirmed.

MANUEL RUIZ, JR.,

Attorney for Appellee,

Helene Marceau Sidebotham.

No. 15,123

IN THE

United States Court of Appeals
For the Ninth Circuit

W. A. ROBISON, Administrator of the
Estate of Robert Sidebotham, De-
ceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

VS.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLANTS' REPLY BRIEF.

FRANK J. FONTES,

City Hall, San Francisco 2, California,

DELGER TROWBRIDGE,

819 A Street, San Rafael, California,

Attorneys for Appellant

W. A. Robison as

Administrator of the

Estate of Robert Russell

Sidebotham, Deceased.

THEODORE M. MONELL,

Mills Building, San Francisco 4, California,

Attorney for Appellants

Robert Sidebotham and

James Sidebotham.

FILED

DEC 28 1956

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Introduction	1
Tracing of assets	3
Was evidence inherently improbable?	4
The law	5
Decree of heirship	11
The District Court considered the Wyoming decree void ..	16
Laches and estoppel	23
Miscellaneous rulings on evidence	26
Appeal from lower court's refusal to allow expenses of defense	27

Table of Authorities Cited

Cases	Pages
Anderson v. Goff, 72 Cal. 65, 13 Pac. 73	20
Baldwin v. Baldwin, 28 C (2) 406, 170 P (2) 670	18
Chadwick v. Chadwick, 95 Cal. App. 690, 273 Pac. 86	25
Champion v. Wood, 79 Cal. 17, 21 Pac. 534	23, 25
Churchill v. Woodworth, 148 Cal. 669, 84 P 155	13
City and County of San Francisco v. Superior Court, 37 C (2) 227, 231 P (2) 26	10
Clarke v. Shoshone Lumber Co., 224 Pac. 845, 276 U.S. 595..	20, 21
Delanoy v. Delanoy, 216 Cal. 27, 13 P (2) 719	18, 19
Estate of Adams, 132 CA (2) 190, 282 P (2) 190	4
Estate of Anderson, 142 ACA 452, 298 P (2) 105 (June, 1956)	4
Estate of Doran, 138 CA (2) 541, 292 P (2) 655	4
Estate of Hanson, 126 CA (2) 71, 271 P (2) 563	4
Estate of Harris, 9 C (2) 649, 72 P (2) 873	4
Estate of Rattray, 13 C (2) 702, 91 P (2) 1042	4
Estate of Simonton, 183 Cal. 53, 190 Pac. 442	4
Harris v. Harris, 196 F (2) 46 (D.C. Ct. of App., 1952) ...	25
Hoagland v. Hoagland, 57 Pac. 20	23
Hollyfield v. Geibel, 20 CA (2) 142, 66 P (2) 755	13
In re McNeil's Est., 155 Cal. 333, 100 Pac. 1086 (Utah)	23
Kaufman v. California Mining Syndicate, 16 C (2) 90, 104 P (2) 1038	22
Ligare v. California South. R. Co., 76 Cal. 610, 18 Pac. 777	20
Marcus v. Marcus, 90 N.Y.S. (2) 830	21
Migala v. Dakin, 99 Cal. App. 60, 277 Pac. 898	25
Morris v. Jones, 329 U.S. 545, 67 S. Ct. 451	20
New York Cas. Co. v. Superior Court, 30 CA (2) 130, 85 P (2) 965	10

TABLE OF AUTHORITIES CITED

iii

	Page
Parsons v. Weiss, 144 Cal. 410, 77 Pac. 1007	20
Patterson v. Patterson, 82 CA (2) 838, 187 P (2) 113	19
Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138	22
Schuyler v. United Air Lines, 10 F.R.D. 110	9
Scourtes v. Fred W. Albrecht Co., 15 F.R.D. 55	9
Sullivan v. Curry, 40 F (2) 948	12
Tarien v. Phil C. Katz, 216 Cal. 554	23
Thompson v. Hickman, 89 CA (2) 356, 200 P (2) 893 (1949)	9
White v. White, 26 Cal. App. 2d 524	6
Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092	21
Williams v. State of North Carolina, 317 U.S. 287	19

Statutes

California Code of Civil Procedure:	
Section 1847	17
Section 1963, Subdivision 40	4
Section 1973, Subdivision 5	7
California Probate Code, Section 1088	11
Wyoming Statutes, 1931 Edition, Section 89-817-822	20
Wyoming Compiled Statutes of 1945, Section 3-5406	23

Texts

21 Cal. Jur. 510, Section 33	19
29 Cal. Jur. (2) 198-200, Judgments, Section 238	15
50 Corpus Juris Secundum 482, notes 69 and 70	21
McCormick on Evidence, p. 204, note 15	10
Wigmore, Evidence, Volume 2, Third Edition, Section 286, page 168	7

No. 15,123

IN THE

**United States Court of Appeals
For the Ninth Circuit**

W. A. ROBISON, Administrator of the
Estate of Robert Sidebotham, De-
ceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

VS.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLANTS' REPLY BRIEF.

INTRODUCTION.

Appellee in her brief claims with an air of injured innocence that appellants have charged her with being a calculating and conniving woman, an adventuress, and a violator of moral laws; her counsel claims that her amoral life should not be inquired into because it is immaterial and that her unconventional career is due to the fact that she had to live "with a blustering cave-man egomaniac".

Ordinarily the life and character of appellee would not be material in an argument before this Court, and

it was with great reluctance that we delved into it. However, we were forced to bring out the unsavory details of appellee's career before and after marriage with Robert Sidebotham, deceased, because judged as a whole it shows that her main evidence to support her case was inherently improbable (see pages 14-17 and 19-21 of our opening brief). It also shows that she was not an innocent ignorant woman capable of being easily imposed on. Her settlement agreement of April 24, 1930, with Robert Sidebotham, her separate maintenance suit claiming community property rights inter alia, filed in Los Angeles on March 31, 1933, against Mr. Sidebotham, by *her present attorney*, and her letter of March 3, 1932, to the first Mrs. Sidebotham inquiring about her alimony, all show appellee to be an exceptionally well advised and avaricious woman; one who undoubtedly never relied on anything Mr. Sidebotham told her without checking it. She of all women had no business relying on any statement made to her by Mr. Sidebotham. When she told her lawyer in Nevada that there was "no community property" and swore to this statement in her divorce complaint she had undoubtedly investigated this matter and knew that her statement was true. This is corroborated by the fact that her astute counsel, whom she has had for 23 years at least, was unable at the trial to show any evidence that Mr. Sidebotham had any property at all at the time of the Nevada divorce.

We will discuss appellee's brief using the same headings which appellee used in her brief and in the same order.

TRACING OF ASSETS.

This subject, which is the most important subject in the case, is dealt with by appellee in three paragraphs which take less than a page of space in her brief (see page 6) and which neither contain any authorities nor discuss any of ours. Her complaint shows that she was the one who tendered the issue of identity of assets—that is, she pleaded that the assets which the Administrator of Robert Sidebotham's estate took over at the time of his death in 1951 were community assets which Robert Sidebotham had acquired during the married life of appellee and himself and which he had in his possession at the time of the divorce in 1946. Appellee's contention on this point is summed up in the second paragraph on page 6 of her brief as follows:

“Appellants have failed utterly to point out by any reference to the evidence wherein the same was insufficient to support the findings or what illegal inferences were drawn therefrom by the trial court.”

This is certainly a most naive argument for a skilled lawyer of long experience to make to this Court. It is elementary, as appellee's counsel well knows, that the burden of proof is on the party who has the affirmative side of the issue and certainly the plaintiff by her pleading assumed the affirmative side on this point, which she of course had to do, and the burden of proof is therefore on her. In addition to the condition of her pleading, we cited the following cases which as a matter of law hold that the burden of proof is on the surviving spouse to identify the property which she claims was

the community property of herself and her spouse when the marriage was dissolved. The cases on this subject which we cite below have been codified in Section 1963, Subdivision 40, of the Code of Civil Procedure of the State of California quoted on page 23 of our opening brief. The cases which we quoted or cited on this point in our opening brief are the following:

Estate of Simonton, 183 Cal. 53, 60, 190 Pac. 442;
Estate of Hanson, 126 CA (2) 71, 77, 271 P (2)
 563, 567;

Estate of Doran, 138 CA (2) 541, 549 292 P (2)
 655, 661;

Estate of Rattray, 13 C (2) 702, 705, 91 P (2)
 1042;

Estate of Harris, 9 C (2) 649, 662, 72 P (2) 873;
Estate of Anderson 142 ACA 452, 453, 298 P (2)
 105, 107 (June, 1956).

In accord also is:

Estate of Adams, 132 CA (2) 190, 196, 282 P (2)
 190, 198.

WAS EVIDENCE INHERENTLY IMPROBABLE?

On this point appellee merely makes general statements that the Appellate Court is not allowed to weigh the testimony of witnesses. Appellee of course entirely overlooks the fact that where the testimony of a witness such as that of the appellee in this case is fantastic and obviously false, the general rule does not apply and that the Appellate Court has the right to disregard such inherently improbable testimony (pages 19-21 our opening brief). Here again appellee instead of analyz-

ing and discussing the testimony specified in our opening brief, merely attempts to laugh off appellants' specifications by generalities which prove nothing.

THE LAW.

Under this heading various unrelated points are made, only two of which need to be answered.

Appellee starts out by referring to page 22 of our opening brief in which appellants pointed out briefly that the opinion of this Court, which passed only on the sufficiency of the last complaint involved in the prior appeal reported at 216 Fed. 2d 816, has no materiality in this case because there was no trial of the facts involved on the previous appeal. Also that the evidence was far from supporting the important allegations of the complaint. Appellee meets this subject merely by saying:

“Throughout the course of the trial and in the Reporter's Transcript of the evidence, not a single objection appears to the effect that any proof was offered at *variance with the pleadings*.”
(All emphasis added).

Appellee has misconceived the purpose of our discussing the effect of the opinion on the earlier appeal. We do not claim that the judgment is erroneous because there is a fatal variance between the facts and the pleadings. What we claim is that the credible evidence in this case when taken as a whole does not prove the allegations in the last complaint, especially when the

inherently improbable testimony is disregarded. The opinion on the prior appeal did not discuss the all-important issue of tracing the assets back to the time of the divorce. Also such affirmative defenses as *res judicata* (based on the decree in the San Francisco Probate Court of December 14, 1953), and the defense of the Wyoming Decree, which dissolved the marriage of the parties in 1940, were not in any pleading before this Court on the prior appeal. Therefore, the prior opinion can have no bearing on these points.

Furthermore, the *evidence* produced by appellants in support of the affirmative pleas of laches and equitable estoppel was not before this Court in the earlier proceeding; what was said in the opinion before on these subjects only applies to the question of what facts were *pleaded* by *plaintiff* relating to these subjects. The evidence produced by appellants in support of these affirmative defenses pleaded in their answers was of course not before this Court on the prior appeal and could not possibly have been.

Near the bottom of page 9 appellee makes an entirely unrelated legal point, to wit, that since the defendants objected to certain evidence being received by the Court, which was entirely inadmissible because it was obviously hearsay, and also privileged under the attorney-client relationship, that trial Court presumed and this Court must as a matter of law presume that the evidence which was objected to and not received must have been adverse to the defendants and that this presumption would support plaintiff's judgment. In support of this presumption, appellee cited *White v. White*,

26 Cal. App. 2d 524, which states the general rule and properly applies it to the facts in that case.

Under the facts in this case, we have an entirely different situation and the rule found in Section 1973, Subdivision 5, of the California Code of Civil Procedure does not apply because it would be against common sense to apply the rule in the present case. The code section relied on is nothing but the statement of a universal rule of evidence. Professor Wigmore in his famous treatise on evidence (Volume 2, third edition, Section 286, page 168) points out that this rule should not be applied to evidence which is wholly inadmissible including that which is ordinarily considered confidential as a matter of law because of some relationship such as that of attorney and client.

“Of course, a rule of evidence other than a rule of privilege for the party is a means of excluding evidence which he is always entitled to take advantage of; and his objection to prohibited evidence (or his failure to waive an objection) cannot in any way be construed to his disadvantage, since by hypothesis the evidence is prohibited, not for his personal sake on grounds independent of the value of the evidence, as privileged evidence is (post, sec. 2196), but because of the untrustworthiness of the evidence. No doubt a party usually does take advantage of such rules because the forbidden evidence is unfavorable, and no doubt the opponent constantly seeks by *inneundo* to give an unfavorable meaning to such objections. But the rules of evidence could never be enforced if parties were not guaranteed free scope in calling attention to the impending violation of the rules; and it is universally assumed and understood that

no inference can lawfully be urged in consequence of such objections.”

This subject is well discussed in a note in 30 California Law Review at pages 80 to 81 as follows:

“It is not, however, to be inferred from every failure to produce a witness that the testimony of such witness would have been adverse to the non-producing party. The effect of the rule is circumscribed by common sense limitations. Thus it is held that the inference derived from the non-production of witnesses is not allowed to take the place of proof on any issue in order to make out a case against a party, but is available only after a *prima facie* case has been made out. In a criminal trial where the burden is on the people to prove facts necessary to establish the defendant’s guilt, the latter is not required to prove anything and no inference can be raised against him for failure to offer any evidence. And where by law the prosecution is precluded from offering proof on any matter until the defendant has put that matter in issue, no unfavorable inference can be deduced from the defendant’s failure to open the issue. Also failure to call a witness is always subject to explanation and where it is not in a party’s power to produce a witness or where if produced he would be unlikely to give impartial testimony because of an interest adverse to the party, it cannot be inferred that the testimony of such witness would have been unfavorable to him.

Where there exists one of the privileged relationships set forth in section 1881 of the Code of Civil Procedure and the witness himself claims that privilege when called to the stand, the rule does not apply and no inference may be drawn.

Similarly, where the court excludes testimony on a party's objection that it is privileged, no inference can be drawn that the testimony would have been adverse to the objecting party, it not being the policy of the law to exclude testimony and then raise an inference prejudicial to the party at whose insistence it was excluded."

There are several cases to the same effect in California, most of which are summarized in the recent case of *Thompson v. Hickman*, 89 CA (2) 356 at page 362-364; 200 P.(2) 893 at 897 (1949). The only testimony referred to on this point by appellee is the testimony of Mr. Frank J. Fontes, the attorney for the estate, as to a certain report ordered by and prepared for the use of the attorneys in this case by William Dolge and Co., Certified Public Accountants. It is obvious that the report referred to was prepared by William Dolge and Co. on the basis of information gathered from them outside of Court and is hearsay based on hearsay. No attempt was even made to produce any representative of William Dolge and Co. to testify as to the information gathered by his concern out of Court. In addition to this, the report of William Dolge and Co. was obviously a privileged communication, as the investigation and report were ordered by defense counsel to enable them to prepare the defense of the case, and under recent federal Court and California cases it is plainly a privileged communication

Schuyler v. United Air Lines, 10 F.R.D. 110,
111;

Scourtes v. Fred W. Albrecht Co., 15 F.R.D. 55,
58;

City and County of San Francisco v. Superior Court, 37 C (2) 227, 234, 231 P (2) 26, 29;
New York Cas. Co. v. Superior Court, 30 CA (2) 130, 132, 85 P (2) 965, 966;
McCormick on Evidence, p. 204, note 15.

At the bottom of page 10 appellee makes a brief argument on the subject of tracing the assets which belongs more properly under the heading, "Tracing of Assets" on page 6 of appellee's brief. However, the argument on the bottom of page 10 proves nothing because the contents of the safe deposit box which were found in 1952 do not show and no other evidence shows when they were placed in the safe deposit box or where they came from. Defendant's Exhibit L shows that Robert Sidebotham, deceased, went into his safe deposit box many times each year from May 22, 1945 down to the time of his death, and *fifteen* times *after* January 1, 1947 (Tr. 229-230). There is no testimony in the record that any of the contents of the box were ear-marked and the main contents consisted of 751 pieces of *undescribed* currency (denominations from \$5.00 to \$1,000.00 bills totalling \$64,770.00 (Tr. 191-192).

Furthermore, the other main asset, namely, the real estate which Mr. Sidebotham bought about a year before his death and placed of record *in his own name* was certainly not owned by him at the time of the divorce. There is not an iota of evidence showing where the money came from with which the property was bought in 1950, and appellee makes no effort at all to show that this real estate which was sold for

\$27,500.00 was the proceeds of any community property owned by this decedent at the time of the 1946 divorce.

DECREE OF HEIRSHIP.

The subject of the effect of the decree of the Probate Court made by the San Francisco Superior Court on December 14, 1953, is dealt with by appellee in a most casual manner and without the citation of any authorities in support of her position which have any bearing on this point. Appellee's main argument on this subject is that the issue in the Petition to Terminate Heirship under California Probate Code Section 1088, and the parties were different from any issue or the parties in the present case. Taking up the matter of the parties first, it is obvious from a slight examination of the pleadings in both cases that the parties were the same. The petitioner in the probate proceeding and the plaintiff in the Superior Court case which was transferred to the United States District Court were one and the same person, to wit, Helene Marceau Sidebotham. The defendants in the Superior Court case were Robert E. Sidebotham and James J. Sidebotham who appeared in the probate proceeding and were found by the decree to be the only heirs at law of said decedent, as in the decree of the Probate Court establishing heirship (Tr. 65).

They were made defendants in the action commenced in the Superior Court which was removed to the United States District Court by the appellee and she does not question but what they are the same

parties who appeared as respondents in the Probate Court.

Paragraph VIII of the Findings of Fact in the present case specifically states that

“The defendants Robert Sidebotham and James Sidebotham are sons of the decedent by a prior marriage and are entitled to take as heirs at law.”

This makes it clear that defendants Robert Sidebotham and James Sidebotham in this case are the same parties who appeared in the San Francisco probate proceeding as found in the decree establishing heirship (Tr. 65). The only difference as to parties in these two proceedings is that Phil C. Katz (Public Administrator of the City and County of San Francisco), Administrator of the Estate of Robert Sidebotham, and later his successor in office W. A. Robison as Administrator was an additional party defendant. It is well settled, however, that the administrator is merely a stakeholder holding the property for the real parties in interest, who in this case are the two sons, Robert Sidebotham and James Sidebotham, and apparently in this case if here judgment is affirmed. It was on the theory that the Administrator of the Estate of Robert Sidebotham was only a stakeholder and not a real party in interest that the case was removed from the San Francisco Superior Court to the United States District Court.

Sullivan v. Curry, 40 F (2) 948.

It is also well settled by California law that if the Administrator of the estate had not been made a party but the heirs at law had been the sole parties defend-

ant, any valid judgment obtained by the plaintiff would be binding upon the estate assets.

Hollyfield v. Geibel, 20 CA (2) 142, 66 P (2) 755;

Churchill v. Woodworth, 148 Cal. 669, 84 P 155.

It is very significant that of the thirteen cases cited by appellants on this point appellee attempted to distinguish only one and did not succeed in that effort.

There was only one issue set up in the petition in probate to determine heirship and that was one of the issues alleged in the Superior Court equity action. This will appear by comparison with the last complaint in the present action.

The allegations in the heirship petition briefly summarized are as follows (Tr. 61-64):

That Robert Russell Sidebotham died intestate during the month of December, 1951.

Then appellee alleged that the

“estate consists of community property only, as well as increase thereof, all of which constitutes property of petitioner by virtue of the following facts” (Par. V of petition).

She then alleged the Mexican marriage on May 30, 1928, and the continuance of the marriage from May 30, 1928 up to the divorce on November 14, 1946. Then follows an allegation that the matrimonial domicile of the petitioner and Robert Sidebotham was at all times the State of California. Thereafter she alleged that during the marriage decedent accumulated and acquired real and personal property consisting in excess

of \$75,000.00 cash on deposits in banks within the State of California, including real estate and other properties, nature and extent of which were unknown to petitioner. In the next paragraph of her petition she alleged that said community property had never been partitioned either by agreement of petitioner and Robert Sidebotham, judicial decision, or otherwise, and that upon the death of Robert Sidebotham petitioner became entitled to receive one-half thereof by survivorship and retain the other half thereof, which she at all times owned from the moment of its acquisition during the marriage.

The final complaint on which appellee relied is a jumble of several complaints, most of which are in the record on file, but they are not set out in logical order. However, summarizing the allegations of the various complaints as they appear in the record, the following allegations appear:

1. The marriage of appellee and Robert Sidebotham in Mexico on May 30, 1928 and the Nevada divorce on November 14, 1946 (Tr. 15-16).

2. That Robert Sidebotham died intestate on December 21, 1951 (Tr. 3).

3. That Robert Sidebotham at the time of his death was in possession and control of certain property described in Exhibit E attached and incorporated in the complaint; that he was likewise in possession and control of additional property the nature and extent of which was unknown to the plaintiff (Tr. 5); that at the time of the death of said Robert Sidebotham, plaintiff and he were tenants in common of said prop-

erty and each of them was an owner of an undivided one-half of said property; that since the death of Robert Sidebotham plaintiff continued to own an undivided one-half of said property as her separate estate.

4. That the Administrator of the Estate of Robert Sidebotham was in the possession of property which constituted property owned in common by plaintiff and Robert Sidebotham (Tr. 5).

5. That plaintiff all times mentioned was the owner of 50% of the assets and property, both real and personal, as well as the fruits and increase thereof, which Robert Sidebotham possessed at the time of his demise; that the property referred to in Exhibit A attached to the complaint constituted property acquired and accumulated by Robert Sidebotham during their marriage, as well as the fruits and increase thereof (Tr. 12).

It is clear that the allegations just referred to as appearing in plaintiff's complaint (as amended at various times) contain everything that was alleged in her petition to determine heirship and that therefore the issues in the petition to determine heirship were in legal effect identically the same with some of the issues found in the Superior Court complaint filed in the City and County of San Francisco. This being so, the doctrine of *res judicata* must be applied.

29 *Cal. Jur.* (2) 198-200, sec. 238 Judgments.

**THE DISTRICT COURT CONSIDERED
THE WYOMING DECREE VOID.**

We do not wish to weary this Court by repeating a summary of the facts or the authorities relied upon us on pages 34 to 36, both inclusive, of our opening brief.

The importance of this point is that if the District Court had given full faith and credit to the Wyoming Decree as it was required to by decisions construing the United States Constitution, the marriage would then have been legally dissolved as of the date of the Wyoming Decree, which was November 2, 1940. This would make it even more clear that appellee did not show that any of the property on hand at the time that Robert Sidebotham died in 1951 was owned by him in 1940 when the marriage was first legally dissolved.

Appellee again places her entire collateral attack on the following allegation in the affidavit filed prior to publication of summons in Wyoming, as follows:

“That he (Robert R. Sidebotham) has exercised due diligence and inquiry as to the whereabouts of the above named defendant (appellee) and that he finds that said defendant does not reside in the State of Wyoming; that her residence is unknown and cannot with reasonable diligence be ascertained.”

Appellee contends that this affidavit was false in the last sentence *and nowhere else* and that this was a fraud upon the Wyoming Court because the publication of summons could not be supported by such an

affidavit. It is uncontradicted that the first sentence quoted above from the affidavit is true, namely that the defendant did not reside in the State of Wyoming and could not by the exercise of due diligence and inquiry be found in Wyoming. Appellee does not deny that she was living in San Francisco, California, during all of this time. The statement by Robert R. Sidebotham that her residence was unknown and could not with reasonable diligence be ascertained may well have been true as far as his personal knowledge was concerned and there is nothing in the record to show that he knew *at that time* that the statement was *not* true. Since the law presumes the affiant spoke the truth (Sec. 1847, Calif. Code Civil Procedure) the burden of proof was on appellee to show that her husband was consciously lying at the time when he made this statement. Especially since the judgment was fifteen years old when she first attacked it at the time of the trial in 1955. Appellee's entire discussion of the facts on the question of the alleged false statement in the Wyoming affidavit is stated as follows on page 15 of her brief:

“The testimony of the witness Mr. Scardino (Rep. Tr. P. 206 et al.), whose parents owned the hotel where the plaintiff visited in San Francisco and where decedent had been visiting her in the year 1940 and paid the rent corroborated plaintiff's testimony to the same effect.”

Mr. Scardino never mentioned any specific day when he met Mr. and Mrs. Sidebotham together at 380 Union Street, San Francisco, but he did say twice that he met them during the month of February, 1940,

at these premises (Tr. 208-209) and again about three weeks after (Tr. 210), which could not have been later than March of 1940. Mrs. Sidebotham's testimony is no more specific as to time. Mr. Sidebotham's affidavit which appellee contends was false (in part only) was signed on August 6, 1940, and it is quite possible that Mr. Sidebotham may have attempted to locate Mrs. Sidebotham by letter in July of 1940 and that the letter was either returned by the post office or that he received no answer to his letter. He would, therefore, have the right to assume that she had disappeared and he would then be justified in stating that her address was unknown to him and it could not with reasonable diligence be ascertained by him. Certainly no Court has the right to assume on the basis of the testimony of Mr. Scardino or the similar testimony of the appellee, which is not specifically referred to in her brief, that he consciously made a false statement on August 6, 1940; this would not overcome the presumption that Mr. Sidebotham spoke the truth.

Appellee has not in our opinion successfully distinguished the many strong cases supporting appellants' contention on this subject, but appellants desire to point out that the case of *Delanoy v. Delanoy*, 216 Cal. 27 (13 P (2) 719) cited on page 15 by appellee is not in point in this situation. The *Delanoy* case was distinguished in *Baldwin v. Baldwin*, 28 C. (2) 406, 410; 170 P (2) 670, 673, in which it was held that if the foreign Court had jurisdiction of the parties the California Court would not allow a collateral attack on the decree because of false statements made at the trial.

In that case the California Supreme Court upheld the trial Court in refusing to permit a wife

“to introduce evidence to prove her claim that defendant (husband) was the wrongdoer and that his Nevada divorce was secured by untruthful testimony regarding acts of cruelty by plaintiff towards defendant.”

Basing its decision on this point on the case of *Williams v. State of North Carolina*, 317 U.S. 287, *Patterson v. Patterson*, 82 CA (2) 838, 841, 187 P (2) 113, 114, followed the *Delanoy* case on this point. In its opinion the District Court of Appeal said:

“Plaintiff attacks the Nevada decree on the ground of fraud. She argues it was obtained by false testimony of her cruel treatment of defendant. A similar argument was made and rejected in the case of *Baldwin v. Baldwin*, 28 Cal. (2) 406, 170 P (2) 670, on the authority of *Williams v. State of North Carolina*, 317 U.S. 287.”

Furthermore since the allegation in the affidavit “that said defendant (appellee) does not reside in the State of Wyoming” (Defs’ Ex. E) is admittedly true, other allegations in the affidavit whether true or false are immaterial and should be disregarded. As is said in 21 *Cal. Jur.* 510, sec. 33:

Process:

“Services of summons by publication is authorized where it sufficiently appears by affidavit that ‘the person on whom service is to be made resides out of the state.’ If this fact is shown by the affidavit, it is not necessary to set

forth therein that such person cannot after due diligence be found within the state; any such statement is immaterial.”

This text statement is supported by the following cases:

Anderson v. Goff, 72 Cal. 65, 69, 13 Pac. 73, 75;
Ligare v. California South. R. Co., 76 Cal. 610,
 612, 18 Pac. 777, 780;
Parsons v. Weiss, 144 Cal. 410, 415, 77 Pac.
 1007, 1010.

It cannot be successfully argued that the Wyoming Court did not have jurisdiction to act because the plaintiff was in Wyoming and got jurisdiction over the defendant by the publication of summons following an affidavit containing the one and only important fact required in this case by the revised statutes of Wyoming (Sections 89-817-822, 1931 Edition), namely that the defendant (appellee) did not reside in the State of Wyoming. A similar form of affidavit was approved against *direct* attack by the Supreme Court of Wyoming and the Supreme Court of the United States, *Clarke v. Shoshone Lumber Co.*, 224 Pac. 845, 849, 276 U.S. 595. It is elementary that Courts will not limit attacks on direct appeal (as in the cited case) as much as they will on collateral attack as in the present case.

It is well settled that the federal Courts will give the same weight to the decision of a sister state that the Courts of that state will give its judgment. As was said in *Morris v. Jones*, 329 U. S. 545 at 551, 67 S. Ct. 451, 456:

“The full faith and credit to which a judgment is entitled is the credit which it has in the state from which it is taken.”

See to the same effect

50 C.J.S. 482, notes 69 and 70.

Accordingly the federal Court must give the Wyoming decree full faith and credit because, as shown by the case of *Clarke v. Shoshone Lumber Company*, supra, the affidavit in this case was found to be satisfactory by the Wyoming Supreme Court *even on direct attack on appeal*.

It is elementary that a federal Court as well as a sister state in testing the validity of the judgment of another state on collateral attack requires clear and convincing factual proof of the invalidity of the original judgment. As was said by Mr. Justice Frankfurter in *Williams v. North Carolina*, 325 U.S. 226, 233, 65 S.Ct. 1092, 1097, as to a foreign decree:

“It is entitled to respect *and more*. The burden of undermining the verity which it imports *rests heavily upon the assailant*.”

A strong discussion of the sanctity of such decrees is found in *Marcus v. Marcus*, 90 N.Y.S. (2) 830 at 836, where the learned judge said as follows:

“Those who impugn such decrees are not to succeed by any mere ‘fair preponderance’; *they must do far more*. They must present proof meeting the tests indicated by the few cases on the subject; this defendant’s evidence plus the decree will protect her remarriage unless plaintiff’s ‘countervailing evidence’, or her admissions, etc., ‘satis-

fies the court' that 'error was committed' by the Nevada court, *Selkowitz v. Selkowitz*, 272 App. Div. 1071, 74 N.Y.S. 2d 532, *supra*; that countervailing proof must be such as 'establishes' lack of jurisdiction, *Dalton v. Dalton*, 270 App.Div. 269, 270, 59 N.Y.S. 2d 68, 70, citing *Matter of Holmes' Estate*, 291 N.Y. 261, 52 N.Y.S. 2d 424, 150 A.L.R. 447. The decree '*is entitled to respect, and more.*' The burden of undermining the verity which (it) import(s) *rests heavily upon the assailant*', 2d Williams v. North Carolina case, 325 U.S. 226, 233-234, 65 S.Ct. 1092, 1097, 89 L.Ed. 1557, 1577 A.L.R. 1366; there must be 'a factual demonstration of its invalidity', *Pereira v. Pereira*, 272 App.Div. 281, 287, 70 N.Y.S. 2d 763, 767; the attack must 'overthrow the apparent jurisdictional validity * * * by disproving (her) intention to establish a domicile' in Reno, *Matter of Franklin v. Franklin*, 295 N.Y. 431, 434, 68 N.E. 2d 429, 430, citing 2d Williams case, *supra*." (All emphasis supplied.)

Where an affidavit, on which a publication of summons is based, seems insufficient or defective, a Court in which a decree, valid on its face, is being attacked collaterally because of the affidavit, will go to almost absurd lengths in presuming there was other sufficient proof (such as another affidavit) to support the decree.

Kaufman v. California Mining Syndicate, 16 C (2) 90, 93, 104 P (2) 1038 at 1040;

Sacramento Bank v. Montgomery, 146 Cal. 745, 751, 81 Pac. 138, 140, per Angellotti, C.J.

It must also be remembered that appellee cannot collaterally attack the Wyoming Decree for any false-

hood in the affidavit of publication because the affidavit was not properly made a part of the judgment roll in 1940 according to Wyoming Law (Wyoming Compiled Statutes of 1945, Section 3-5406). See *In re McNeil's Est.*, 155 Cal. 333, 341, 100 Pac. 1086, 1089 (Utah). *Hoagland v. Hoagland*, 57 Pac. 20 at 22.

LACHES AND ESTOPPEL.

Here again appellee's answer to our argument as to the application of the doctrines of laches and of equitable estoppel does not begin to answer our contentions. Appellee ignores most of the facts in the record on this point, some of which are stated in appellants' opening brief, and all of the authorities cited by us, except *Champion v. Wood*. As this Court well knows, it is impossible usually to cite cases which are absolutely identical in all their facts. We still contend, however, as shown by our discussion on pages 37 to 40 of this case in our opening brief that the language in the opinion in *Champion v. Wood* comes closer to fitting our case than any other decision possibly could. The only case cited by appellee on this point is *Tarien v. Phil C. Katz*, 216 Cal. 554. In this case the parties were married on December 9, 1919 and divorced on May 11, 1926. The main question was the identification of certain property found in his estate after his death in 1930. The Court in discussing the nature of this property said in its opinion:

"The source of the property in dispute was known to exist as early as July, 1922, and certain other accumulations were known to be in existence in 1926 (year of divorce). From these assets were

traced the property in suit. The character thereof must be determined from the testimony of plaintiff herself.”

The Court held that while there was a conflict in the testimony as to whether the property was community or separate, that the wife’s testimony to the effect that it was community property was sufficient to support the judgment of the Court to this effect. There is nothing in this opinion which gives appellee any comfort.

The decision of this Court in 216 F (2) 816 on which appellee so confidently relies with childlike faith as to the defenses of laches and estoppel is not applicable here because the following evidence was not before the Court on the prior appeal when it was considering the sufficiency of the complaint:

1. The *separation* of the parties which commenced on February 2, 1932, according to appellee’s complaint in the Los Angeles Court (Defs’. Ex. C) and continued almost continuously from then until the Wyoming decree in 1940 and thereafter until Robert Sidebotham’s death in 1951.

2. The filing of the separate maintenance action in Los Angeles in 1933 with its reference to “community property” and allegations of defendant’s *fraud* and extreme physical as well as mental cruelty. This action it should be remembered was *never dismissed*. (Tr. 96.)

3. The failure of Robert Sidebotham to give appellee any support or financial help of any kind or even to communicate with her at any time between 1940 and 1951 when he died (Tr. 99).

These matters all show that as a matter of law the confidential relationship between her said husband and herself ceased at least as early as February 2, 1932. (The date fixed in her separate maintenance complaint—Defendants' Exhibit C.) Thereafter she had no right to rely on anything her husband told her; legally the bar of the doctrine of laches started to run against her in 1933 when she retained her present attorney to enforce her rights against her husband.

As to the confidential relationship between the parties ceasing as of February 2, 1932, when appellee no longer had any right to rely on any of her husband's representations see:

Chadwick v. Chadwick, 95 Cal. App. 690, at 709, 273 Pac. 86, 90;

Migala v. Dakin, 99 Cal. App. 60, 63, 277 Pac. 898, 900;

Champion v. Wood, 79 Cal. 17, at 21, 21 Pac. 534, 535.

It should also be remembered that the death of Robert Sidebotham (the real defendant in this case) with the disappearance of all his records, so long after his long marital separation and his two divorces, makes a complete showing of laches.

See *Harris v. Harris*, 196 F (2) 46, 47, (D.C. Ct. of App., 1952) where 14 years delay in assertion of rights followed by death was held to constitute laches as a matter of law.

MISCELLANEOUS RULINGS ON EVIDENCE.

We will not discuss the erroneous rulings on evidence at length because most of the rulings which are set out in the record show on their face without any argument that they are erroneous. These are fully set out with the arguments of appellants' counsel supporting their objections on pages 42 to 48 of the opening brief. Most of the evidence admitted over appellants' objections was obviously hearsay. Much of the evidence of Mr. Daniel J. Byrne, manager of the safe deposit vaults of the Savings Union Branch of the American Trust Company related to documents which his bank received from a neighboring bank which had a safe deposit department and went out of business. The records were made by a person or persons not in the employ of the American Trust Company and certainly not under the supervision of Daniel J. Byrne or under any other employee of the American Trust Company. It is obvious that all of those records were improperly admitted. The summary of accounts with certain banks, building and loan associations and stockbrokers was obviously based on hearsay and should not have been admitted. However, even if they were properly admitted on the basis of the time elements involved, only \$2,828.48 was identifiable as being within the proper time period (p. 47 opening brief). The last evidence erroneously admitted consisted of a report of the United States Government Income Tax Agent, which was very obviously based on hearsay and requires no further argument by appellants.

APPEAL FROM LOWER COURT'S REFUSAL TO
ALLOW EXPENSES OF DEFENSE.

Appellee's answer to this contention is contained in one page starting on page 25 and ending on page 26 of her brief. There is no denial of the facts stated by us nor any discussion of any authority cited by us. The only argument made by appellee on this point is found in the last paragraph on page 26 where she says:

"The lower court accordingly, thought it best, that the same (question of fees) be disposed of by the Probate Court, which court had all of the facts before it, and which facts were not offered into evidence by either of the parties in the pending litigation."

There are two incorrect statements in this part of appellee's brief:

1. That the Probate Court had all of the facts before it, and
2. That the facts were not offered into evidence by either of the parties in the pending litigation.

The record can be searched from stem to stern without finding any reference to what evidence, if any, on this subject was before any Probate Court and full facts were offered into evidence by defendant W. A. Robison, the Administrator in this case through his counsel on February 27, 1956. (See Supplemental Transcript of Record, pages 248 to 250). Particularly the verified petition which was *received in evidence* at that time. The copy of the verified petition itself is found on pages 50 to 55 of the main transcript of record.

We believe that appellee is attempting to make the argument which was made by the trial Court in denying this petition, namely, that the matter of reimbursing the Administrator for his costs of defending the action, including the attorneys' fees, should more properly be disposed of by the Probate Court. However, as was pointed out to the trial Court and stated in our opening brief on this subject, there is a manifest inequity in requiring the balance of the estate not affected by this judgment (approximately one-half) to pay all of the expenses of the defense of this action and to allow appellee to walk away with half of the estate and not pay her share of the expense of bringing the appellant administrator into Court and forcing him to defend a difficult case for a dead man who left no records. Since appellee has not discussed the incontestable authorities cited and discussed by us on pages 4 to 10 of our separate opening brief on the subject of the allowance of expenses of defense, we can consider that appellee has in effect defaulted on this subject and that our brief on this point remains unanswered. Since most of the services rendered by appellant administrator and his attorneys were performed under the eyes of the District Judge, certainly the Judge of that Court is much more competent to value such services than the Probate Court would be.

Wherefore, appellants pray that the judgment of the learned District Court be reversed with instructions to dismiss appellee's action with costs to appellants. If by any chance the judgment should be affirmed then this Court should instruct the District

Court to award the administrator and his attorneys the costs of defending the action.

Dated December 14, 1956.

FRANK J. FONTES,

DELGER TROWBRIDGE,

Attorneys for Appellant

W. A. Robison as Administrator of the Estate of Robert Russell Sidebotham, Deceased.

THEODORE M. MONELL,

Attorney for Appellants

Robert Sidebotham and James Sidebotham.

No. 15123

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. A. ROBISON, Administrator of the Estate of ROBERT
SIDEBOTHAM, deceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

MANUEL RUIZ, JR.,

704 South Spring Street,
Los Angeles 14, California,

Attorney for Appellee.

FILED

APR 30 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

PAGE

The order and judgment of the State Probate Court.....	2
Determination of heirship was limited subject matter of Probate Court controversy	7

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Augisola v. Arnaz, 51 Cal. 45.....	7
Bales v. Superior Court of L. A. County, 21 Cal. 2d 17, 129 P. 2d 685	8
Cromwell v. County of Sac, 94 U. S. 351.....	6
Dabney, Estate of, 37 Cal. 2d 672.....	7
Lane v. Superior Court of Siskiyou County, 98 Cal. App. 2d 165, 219 P. 2d 497.....	8
Sampell v. Superior Court, 32 Cal. 2d 763.....	3
Shaw v. Palmer, 65 Cal. App. 441.....	7
Texas v. Bank of America, 5 Cal. 2d 35.....	7
Van Deusen's Estate, In re, 30 Cal. 2d 285.....	3, 8

STATUTES

Probate Code, Sec. 108.....	7
Probate Code, Sec. 1080	3, 7

No. 15123

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. A. ROBISON, Administrator of the Estate of ROBERT
SIDEBOTHAM, deceased, ROBERT SIDEBOTHAM and
JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

*To the United States Court of Appeals for the Ninth
Circuit, and the Judges thereof:*

Appellee Helene Marceau Sidebotham, presents this,
her petition for a rehearing in the above entitled cause,
upon the following ground:

1. That incorrect principles of law have been applied
in the interpretation of the scope of the determinable issues
in the State Probate Court judgment which is admittedly
the decisive issue on this appeal, and *res adjudicata*.

The Order and Judgment of the State Probate Court.

“ . . . ORDERED, ADJUDGED AND DECREED by the court that Robert Russell Sidebotham, alias, died intestate on the 21st day of December, 1951, leaving surviving as his only heirs at law and the only persons entitled to distribution of said estate Robert E. Sidebotham and James J. Sidebotham, the sons of said decedent; that thereupon the estate of said decedent descended to his said heirs at law and is now vested in them, subject to administration, share and share alike, and each of said persons is entitled to distribution of one-half of said estate when said estate shall be in a condition to be closed.

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petition of Helene Marceau Sidebotham be and the same is hereby denied.”

Appellee had filed an alleged “Claim of Interest” in the Estate of Robert Sidebotham, deceased, before the probate division of the State Superior Court in San Francisco, which rendered the above judgment and order, in the manner set forth in point 2, of the Court of Appeals opinion. Thereafter, the Appellee realized that by virtue of the “subject matter” involved she was in the wrong court so she thereupon, on October 10, 1952, 26 days before December 4, 1952, which was the date the Probate Court heard the above matter, filed another action and other pleadings before the same Superior Court, but not in probate, which pleadings were thereafter served upon Appellants prior to the probate hearing. Said second action is the case at bar on appeal, which was removed from the State Court, to the United States District Court for trial.

It was obvious to Appellee that if she had originally proceeded in the probate division of the Superior Court, on her first petition "claiming adversely to the estate," that said Probate Court would have promptly dismissed the case as to her because she asserted in her petition that she was *not the widow of the decedent*. It was obvious to Appellee that she could not confer jurisdiction on the Probate Court, if it lacked jurisdiction (*Sampell v. Superior Court*, 32 Cal. 2d 763, 766) to adjudge her status as a widow. Since she was not entitled to be heard, she abandoned her abortive petition and effort in the Probate Court, pursued it no further, and elected to proceed with the case at bar instead. Appellee assumed that the probate hearing would simply go off calendar.

The jurisdiction of the Probate Court on her original petition was limited to the establishment of a status, the status of an heir to decedent, or a person entitled to receive by distribution. By her own allegations in said petition to the effect that she was not the widow of the decedent Appellee had precluded said Probate Court from assuming jurisdiction of the "subject matter" since Appellee excluded herself in privity by the said allegations of her petition. (*In re Van Deusen's Estate*, 30 Cal. 2d 285, 291.)

An allegation of privity to and with the estate of the decedent was of the very essence of the subject matter which was indispensable to have given the State Probate Court jurisdiction of the subject matter, under California Probate Code, Section 1080.

On December 10, 1953, a Judge of the Superior Court signed a "decree establishing heirship" upon said petition of Appellee. Appellee's petition in said Probate Court

was denied because she was not an "heir." Neither Appellee nor her counsel were present in court at the time of the alleged hearing. No evidence was introduced. As pointed out by this Appellate Court's decision, Appellee appeared by "her petition" only, which was a "writing" which contained certain legal conclusions, and a prayer that it be determined that all of the property belong to her. Said petition asserted that her marriage to the decedent had been "dissolved by a court of competent jurisdiction." It stated therein that the decedent had "died intestate during the month of December 1951," and further stated that Appellee and the decedent were divorced on "November 14, 1946" which was five years before the decedent died.

The opinion or decision of said Probate Court appears at point 3 of the Ninth Circuit Court's decision and is incorporated hereinabove. Said opinion decided only one thing, to-wit: That the decedent only had two heirs, entitled to distribution, *i.e.*, his sons. When said Probate Court adjudged that the two sons of the decedent were his only heirs, UPON THE PETITION OR CLAIM OF INTEREST filed by the Appellee it also adjudicated of necessity, that the Appellee was not the heir of the decedent. Said Probate Court opinion went no further than to establish heirship, and its judgment is *res adjudicata*, that Appellee was not an heir BUT A STRANGER TO THE ESTATE.

The concluding portion of the opinion of said State Probate Court in the form of an omnibus denial that the "petition of Helene Marceau Sidebotham be and the same is hereby denied" in and of itself added nothing to the actual opinion of the Court of Appeals in the paragraph which preceded the same.

Appellee has no quarrel with the authorities noted by the Court of Appeals of and concerning *res adjudicata*, and Appellee is in agreement with the correct statement of the law by Justice Fields, that a person is bound as "to every admissible matter which might have been presented" and upon "all matters involved in the issue which might have been litigated and decided in the case." Appellee, as a stranger not in privity with the decedent, could not have offered, nor would any offer have been admitted by the State Probate Court, to recognize her as a claimant entitled to distribution.

When Appellee framed the issues on her petition before the Probate Court and affirmatively alleged that the decedent had died five years after her divorce from him which was by a court of "competent jurisdiction," she simply failed to state a cause of action upon her petition for heirship and claim of interest. The Probate Court had neither the power nor authority to render a favorable judgment upon the claim, unless a cause of action had been stated and its sole remaining function was to dismiss or deny it. It could have been dismissed by mandate, or even by demurrer. Since Appellee alleged that she was not the decedent's widow, no evidence was admissible to prove the contrary. Since she alleged she was not the decedent's widow, there was no ground to the contrary which she could have presented. Since she alleged she was not the decedent's widow, there were no issues available to her upon which she could litigate any claim to heirship or distribution. The fact that she claimed that certain community property had accumulated under a "former marriage" to the decedent, would not have authorized the Probate Court, or given power to the court, to decide that she was entitled to the same, as decedent's heir, or

as decedent's widow, since such a judgment would have been void, and a nullity, and therefore not *res adjudicata*.

It is respectfully submitted, that the reasoning of the Court of Appeals, on the face of its printed opinion, ought to be reexamined in consonance with the correct principles of law applicable and particularly its conclusion that the claim of Appellee of and concerning community property placed her in privity with the estate, in the light of her allegations that she was claiming the same adversely to the estate and not in privity with the estate. Appellee is certain that the State Probate Court could not have considered, nor could Appellee have offered into evidence, the claims which she has in the separate action at bar, as a stranger to the estate, and not in privity therewith!

If this Honorable Circuit Court of Appeals were to determine upon a rehearing, upon oral argument, that the Probate Court adjudicated that the Appellee was not an heir, and was a stranger to the estate, and that no other issues could have been determined upon the petition as framed, excepting the question of heirship, and that the opinion of the Probate Court went no further than to determine heirship, as in fact, is the case, then of necessity the opinion of the Honorable Circuit Court of Appeals ought be modified to conform with the authorities concerning the scope of the doctrine of *res adjudicata* within the purview of Mr. Justice Fields opinion in *Cromwell v. County of Sac.*, 94 U. S. 351, from which opinion the Court of Appeals has quoted.

While the quotation of the Court of Appeals, from the case of *Augisola v. Arnaz*, 51 Cal. 45, reads that the "Probate Courts have exclusive jurisdiction of the final distribution of the estate of decedents . . . and such decree of distribution of an estate, after due notice by the Probate Court, is conclusive upon a person who might have claimed that a share of the estate belonged to him," the following cases clarify and clearly distinguish the point involved here to the effect that no one claiming properties adversely to an estate which properties have been included in the estate, is bound by the Probate Courts order of distribution.

Estate of Dabney, 37 Cal. 2d 672;

Texas v. Bk. of America, 5 Cal. 2d 35, 46;

Shaw v. Palmer, 65 Cal. App. 441.

Determination of Heirship Was Limited Subject Matter of Probate Court Controversy.

California Probate Code, Chapter XVII, entitled "Determination of Heirship," Section 1080, reads as follows:

" . . . the executor or administrator, or any person claiming to be an *heir* of the decedent or *entitled to distribution* of his estate or any part thereof may file a petition setting forth his claim . . . and praying that the court determine who are entitled to distribution of the estate."

The definition of an "heir" according to Section 108 of the California Probate Code, is one "who would be entitled to succeed to the property . . . according to the provisions of Division II of this code."

Persons who are entitled to distribution, are described in California Probate Code, Chapter XVI, as heirs de-

visees, legatees, or the assignee, grantee, or successor in interest of any heirs, devisee or legatee.

A divorced wife is not included within the provisions of Division II of the California Probate Code or within the description of a person entitled to distribution of a decedent's estate.

Under this section regulating procedure for determination of heirship, a petitioner is not entitled to be heard unless he claims to be an heir, and when such claim is made, the court acquires jurisdiction to determine heirship and also the interest of each respective claimant to the estate.

In re Van Deusen's Estate (1947), 30 Cal. 2d 285, 291, 182 P. 2d 565.

Probate proceedings are purely statutory and special in their nature, so that the Superior court, although a "court of general jurisdiction," is circumscribed in heirship proceedings by this chapter conferring jurisdiction and may not competently proceed in a manner essentially different from that provided by this chapter.

Bales v. Superior Court of Los Angeles County (1942), 21 Cal. 2d 17, 24, 129 P. 2d 685.

Where a petition to establish heirship has been filed and the notice prescribed by this section and 1200 has been given, the probate court has jurisdiction to proceed with the whole matter of heirship in the decedent's estate. It is a decree not *in persona* in favor of one party against another but only declares the status of a *res*, to-wit: privity with the estate.

Lane v. Superior Court in and for Siskiyou County (1950), 98 Cal. App. 2d 165, 167, 219 P. 2d 497.

Wherefore, petitioner respectfully urges that a rehearing be granted and that the mandate of this court may be stayed pending the disposition of this petition.

MANUEL RUIZ, JR.,
Attorney for Appellee.

Certificate of Counsel.

The undersigned Attorney for Appellee certifies that in his judgment the above Petition for Rehearing is well founded, and that it is not interposed for delay.

MANUEL RUIZ, JR.,
Attorney for Appellee.

No. 15128

United States
Court of Appeals
for the Ninth Circuit

ROBERT W. BROWN & CO., INC., ROBERT W.
BROWN and OLIVE W. BROWN,

Appellants.

vs.

LEONARD DeBELL (Substituted for United
States License Frame Mfg. Co.),

Appellee.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 178)

FILED

SEP -5 1956

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Southern District of California
Central Division



No. 15128

United States
Court of Appeals
for the Ninth Circuit

ROBERT W. BROWN & CO., INC., ROBERT W.
BROWN and OLIVE W. BROWN,

Appellants.

vs.

LEONARD DeBELL (Substituted for United
States License Frame Mfg. Co.),

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 178)

Appeal from the United States District Court for the
Southern District of California
Central Division

Q. 11

THE
MUSEUM OF
THE
CITY OF BOSTON

THE
MUSEUM OF
THE
CITY OF BOSTON

THE
MUSEUM OF
THE
CITY OF BOSTON

THE
MUSEUM OF
THE
CITY OF BOSTON

THE
MUSEUM OF
THE
CITY OF BOSTON

THE
MUSEUM OF
THE
CITY OF BOSTON

THE
MUSEUM OF
THE
CITY OF BOSTON

THE
MUSEUM OF
THE
CITY OF BOSTON

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	9
Attorneys, Names and Addresses of.....	1
Certificate of Clerk.....	172
Complaint	3
Entry of Judgment.....	27
Exhibits, Defendants':	
G-1—Copy of Griffith Patent No. D134,835	179
G-2—Copy of Watts Patent No. 1,536,414.	181
G-3—Copy of Overton Patent No. 1,660,575	185
H —Copy of Gazan Patent No. D167,885.	187
M —Copy of Orestes Patent No. 1,787,545	189
N —Copy of McRuer Patent No. 1,451,621	193
Findings of Fact and Conclusions of Law.....	14
Judgment	25
Motion and Order for Substitution of Parties..	12
Notice of Appeal.....	27
Statement of Points, Appellants'.....	174
Stipulation Re Book of Exhibits.....	178
Substitution of Attorneys.....	11

INDEX	PAGE
Transcript of Proceedings.....	28
Witnesses, Defendants':	
Bell, Godfrey	
—direct	70
—cross	71
—redirect	75
Bessolo, Joseph C.	
—direct	63
Brown, Merle E.	
—direct	62
Huckelbury, Paul D.	
—direct	32
—cross	36, 66
—redirect	69
—recross	37, 68
Lenk, Paul Edward	
—direct	38
—cross	45
—recross	55
Olson, Stanley M. (Deposition)	
—direct	80
—cross	100
—redirect	113
Sorenson, Robert	
—direct	76
Webb, Charles F.	
—direct	56

INDEX

PAGE

Witnesses, Plaintiff's:

Brown, Robert W.

—direct 155

—cross 167

DuVall, George

—direct 115

—cross 128

—redirect 136

Staples, Harry H.

—direct 140

Titzell, Wallace

—direct 146

—cross 151

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LYON & LYON,
JOHN B. YOUNG,

811 West Seventh Street,
Los Angeles 17, California.

For Appellee:

ROBERT W. FULWIDER, ESQ.,
FULWIDER, MATTINGLY & HUNTLEY,
5225 Wilshire Boulevard,
Los Angeles 36, California.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 16056—PH

UNITED STATES LICENSE FRAME MFG.
CO.,

Plaintiff,

vs.

ROBERT W. BROWN & CO., INC.; ROBERT
W. BROWN, OLIVE W. BROWN, SIDNEY
R. TROXELL, DOE I, DOE II and DOE III,
Defendants.

COMPLAINT FOR PATENT INFRINGEMENT
AND UNFAIR COMPETITION

For a First Claim Against Defendants, Plaintiff
Alleges as Follows:

1.

This action arises under the patent laws of the
United States of America and this Court has juris-
diction thereof under 28 U.S.C. 1338(a).

2.

Plaintiff, United States License Frame Mfg. Co.,
is a partnership comprised of Leonard DeBell and
J. C. Bessolo and has its principal place of business
in the County of Los Angeles, State of [2*] Cali-
fornia.

3.

The defendant Robert W. Brown & Co., Inc., is a
corporation organized and existing under and by

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

virtue of the laws of the State of California, and has a regular and established place of business in Los Angeles County, in the Southern Judicial District of California.

4.

The individual defendants, Robert W. Brown, Olive W. Brown and Sidney R. Troxell, reside and have a regular and established place of business in Los Angeles County in the Southern Judicial District of California.

5.

Doe I, Doe II and Doe III are sued herein under fictitious names and leave of Court will be requested to substitute their true names when the same are ascertained.

6.

On October 7, 1952, United States Design Patent No. D-167,878 for a License Plate Holder was duly and legally issued to Joseph C. Bessolo, who on the 8th day of October, 1952, assigned to the plaintiff herein the entire right, title and interest in and to said patent and the invention covered thereby. Plaintiff has been since said date and still is the owner of the entire right, title and interest in and to said patent with the sole right to sue and collect for all infringements thereof.

7.

Said patent and the invention covered thereby are of great value to plaintiff and the products made and sold by plaintiff embodying said invention have been well and favorably received in the [3] trade and valuable goodwill has been established therein.

8.

The defendants have within six (6) years last past jointly and severally, wilfully and wantonly, infringed and now are infringing, said patent by making, using and selling and causing to be made, used and sold, in the Southern Judicial District of California and elsewhere in the United States, license plate holders embodying the invention disclosed and claimed in said patent and threaten to and will continue to infringe said patent, thereby causing plaintiff great and irreparable damage, unless enjoined therefrom by this Court.

9.

Upon information and belief, the individual defendants Robert W. Brown, Olive W. Brown and Sidney R. Troxell, are directors and officers of the corporate defendant Robert W. Brown & Co., Inc., are the principal stockholders of said corporation, and have personally instigated, directed, controlled and induced and do now direct, control and induce the infringement committed by said corporate defendant and said individual defendants were and are in personal and direct charge and control of all activities of said corporate defendant. Each of the defendants in this action has wilfully and wantonly aided, abetted and conspired with the other defendants named herein, to infringe said patent of plaintiff and to render the same valueless.

10.

The defendants have been notified of their said infringement of said patent.

For a Second and Separate Claim Against Defendants, Plaintiff Alleges: [4]

11.

This action is for unfair competition and this Court has jurisdiction thereof under 28 U.S.C. 1338(b) and under 15 U.S.C. 1121, 1126(h) and 1126(i).

12.

Plaintiff repleads and incorporates herein by reference Paragraphs 2 to 10 of its first claim hereinbefore set forth.

13.

Plaintiff has been and now is engaged in the business of manufacturing and selling in commerce which may be lawfully regulated by Congress, license plate holders embodying the invention disclosed and claimed in United States Design Patent No. D-167,878. Said license plate holders so manufactured by plaintiff have the distinctive appearance and design disclosed in said patent and have been widely sold by plaintiff throughout the United States. Said distinctive appearance and design have acquired a secondary meaning in the trade indicating plaintiff as the source of said goods and that said goods are of recognized good quality.

14.

Defendants have jointly and severally, wilfully and wantonly aided, abetted and conspired with each other to appropriate to themselves the good will that

plaintiff has established in said products and to trade upon the reputation of plaintiff as the manufacturer of high quality products and to unfairly compete with plaintiff, and pursuant thereto, have copied, appropriated and duplicated in all essential respects the appearance and design of plaintiff's said products, all with the intent and for the purpose of confusing and deceiving buyers and prospective buyers and causing them to purchase defendant's goods in the belief that they were and are the goods of plaintiff. [5]

15.

Pursuant to said conspiracy and otherwise, the defendants have jointly and severally, wilfully and wantonly used in commerce that may be lawfully regulated by Congress, by selling and offering for sale without the consent of plaintiff, reproductions, counterfeits, copies and colorable imitations of plaintiff's said products, all of which acts are likely to cause confusion, mistake and deception of purchasers as to the source of origin of said goods, and which acts constitute unfair trade practices and unfair competition with plaintiff.

16.

The acts of unfair competition hereinabove complained of have in fact caused confusion, mistake and deception of purchasers and others in the trade and have enabled defendants to palm off and to enable others to palm off defendants' products as those of plaintiff. By reason of the acts of defend-

ants in unfair competition with plaintiff, defendants have been and are being unjustly enriched and the plaintiff has been and is being irreparably damaged and will continue to be so damaged unless defendants are enjoined by this Court from continuing their said acts of unfair competition. By reason of said acts of unfair competition aforesaid, plaintiff has been damaged in excess of Ten Thousand Dollars (\$10,000.00) and is continuing to be damaged and an accounting is necessary to ascertain the exact amount of such damage.

Wherefore, plaintiff prays for a preliminary and final injunction against further infringement of said Patent No. D-167,878 and against further acts of unfair competition by defendants, their officers, agents, employees, attorneys and those controlled by or associated or in active concert with them; for an accounting of profits and damages for infringement of said patent and by reason of [6] said acts of unfair competition; that the amount of said damages be trebled; for its costs and attorneys' fees incurred in this action; and for such other further relief as this Court shall deem just and proper.

FULWIDER, MATTINGLY &
BABCOCK,

ROBERT W. FULWIDER and
FRANCIS A. UTECHT,

By /s/ ROBERT M. FULWIDER,
Attorneys for Plaintiff.

[Endorsed]: Filed November 19, 1953. [7]

[Title of District Court and Cause.]

ANSWER

Come now defendants Robert W. Brown & Co., Inc.; Robert W. Brown, Olive W. Brown and Sidney R. Troxell, and answering the complaint on file herein allege as follows:

I.

In answer to Paragraph I and II of the first alleged cause of action, defendants deny generally and specifically each and every allegation therein contained.

II.

In answer to Paragraph VI of said first alleged cause of action, these defendants have neither information nor belief pertaining to the matters therein alleged, and placing their denial upon that ground, deny generally and specifically each and every allegation therein contained. [8]

III.

In answer to Paragraph VII of said first alleged cause of action, defendants deny generally and specifically each and every allegation therein contained.

IV.

In answer to Paragraph VIII of said first alleged cause of action, defendants deny generally and specifically each and every allegation therein contained.

V.

In answer to Paragraph IX of said first alleged cause of action, defendants admit that Robert W. Brown, Olive W. Brown and Sidney R. Troxell are directors and officers of the corporate defendant Robert W. Brown & Co., Inc., and except as so admitted deny generally and specifically each and every allegation therein contained.

In Answer to Plaintiff's Second Alleged Cause of Action Defendants Allege:

I.

In answer to Paragraphs XI, XII, XIII, XIV, XV and XVI of said second alleged cause of action, defendants deny generally and specifically, each and every, allegation therein contained and deny that plaintiffs have been damaged in the sum of \$10,000.00, or in any sum whatever, or at all.

As a Separate and Distinct Defense Defendants Allege:

I.

That the license plate holders embodying the invention claimed in United States Design Patent Number D-168,878 have neither a distinctive appearance nor a distinctive design. On the contrary, defendants allege that said license plate holders and the design therefor have been in common usage throughout the United States of America for many years and that the so-called invention of plaintiff does not embody anything novel or distinctive.

License plate holders [9] of the design claimed by plaintiff to be distinctive have been manufactured and sold by many manufacturers other than plaintiff and were designed by others prior to the time that plaintiff secured the so-called design patent.

Wherefore, defendants pray that the complaint on file herein be dismissed and that defendants be awarded his costs, and for general relief.

/s/ SIDNEY R. TROXELL,
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed December 15, 1953. [10]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Defendants Robert W. Brown & Co., Inc., a corporation organized under and by virtue of the laws of the State of California, and Robert W. Brown, and Olive W. Brown, and Sidney R. Troxell, individually, hereby substitute Lyon & Lyon and John B. Young as their attorneys of record in place of Sidney R. Troxell.

Dated: September 8th, 1954.

[Seal] ROBERT W. BROWN & CO.,
INC.,

By /s/ ROBERT W. BROWN,
/s/ ROBERT W. BROWN,
/s/ OLIVE W. BROWN. [12]

I consent to the above substitution.

Dated: September 8th, 1954.

/s/ SIDNEY R. TROXELL.

Above substitution accepted.

Dated: September 8th, 1954.

LYON & LYON,

JOHN B. YOUNG,

By /s/ JOHN B. YOUNG.

[Endorsed]: Filed August 18th, 1955. [13]

[Title of District Court and Cause.]

MOTION AND ORDER FOR SUBSTITUTION OF PARTIES

The plaintiff above named and Leonard DeBell represent to the Court that by a written instrument dated July 12, 1954, and recorded in the United States Patent Office on July 19, 1954, in Liber M 241, Page 210, the plaintiff herein, United States License Frame Mfg. Co., a partnership, sold and assigned to Leonard DeBell the entire right, title and interest in and to United States Design Patent No. D-167,878, the patent in suit herein, together with all claims and rights of action for past and future infringement thereof; and,

The plaintiff above named and Leonard DeBell

herewith move the Court to substitute the said Leonard DeBell as party plaintiff in the action in the place and stead of United States License Frame Mfg. Co. [14]

Dated this 7th day of January, 1956.

UNITED STATES LICENSE
FRAME MFG. CO., and
LEONARD DE BELL, By
FULWIDER, MATTINGLY &
HUNTLEY,

By /s/ ROBERT M. FULWIDER,
Attorneys for Both of Said
Parties.

The defendants in the above-entitled action consent to the above substitution.

Dated this 24th day of January, 1956.

LYON & LYON,
By /s/ JOHN B. YOUNG,
Attorneys for All Defendants.

ORDER

Upon the consent of defendants, as set forth above the foregoing motion is granted; and,

It Is Ordered:

That Leonard DeBell shall and he is hereby substituted as plaintiff in the above-entitled action in

the place and stead of United States License Frame
Mfg. Co.

1/25/56.

/s/ PEIRSON M. HALL,
U. S. District Judge.

[Endorsed]: Filed January 25, 1956.

RWF/hs [15]

In the United States District Court, Southern
District of California, Central Division
Civil Action No. 16056-PH

LEONARD DEBELL (Substituted for U. S. License
Frame Mfg. Co.),

Plaintiff,

vs.

ROBERT W. BROWN & CO., INC.; ROBERT W.
BROWN and OLIVE W. BROWN,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for hearing
in open Court, evidence, oral, documentary and
physical having been introduced and the Court hav-
ing fully considered the same, together with argu-
ments of counsel, the Court makes the following
findings of fact and conclusions of law, to wit:

Findings of Fact

1.

The original Plaintiff herein, United States License Frame Mfg. Co., is a partnership comprised of Leonard DeBell and J. C. Bessolo and has its principal place of business in the County of Los Angeles, State of California. [16]

2.

The defendant, Robert W. Brown & Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of California and has a regular and established place of business in Los Angeles County in the Southern Judicial District of California.

3.

The individual defendants, Robert W. Brown and Olive W. Brown are husband and wife and reside and have a regular and established place of business in Los Angeles County in the Southern Judicial District of California.

4.

On October 7, 1952, United States Design Patent No. D-167,878 for a License Plate Holder was duly and legally issued to Joseph C. Bessolo, who on October 8, 1952, assigned the entire right, title and interest in and to said patent to the original plaintiff, U. S. License Frame Mfg. Co. On July 12, 1954, United States License Frame Mfg. Co. assigned to the present Plaintiff, Leonard DeBell, the

entire right, title and interest in and to said Letters Patent, together with all claims and rights of action for profits and damages by reason of past infringements thereof, with the sole right to sue for and collect the same for his own use and benefit. Leonard DeBell is the present owner of said Letters Patent with the sole right to sue and collect for all infringements thereof.

5.

The patent in suit, D-167,878, and the invention covered thereby are of great value to Plaintiff, products made and sold by Plaintiff embodying said invention having been well and favorably received in the trade. Shortly after the invention of the design of the patent in suit, the Plaintiff, U. S. License Frame Mfg. Co. obtained an [17] order (Exhibit 6) from Ridings Motors in Long Beach, California, on March 6, 1948, for 300 pairs of license frames embodying said invention. Said license frames embodying the design of the patent in suit were made and delivered by Plaintiff prior to and were invoiced (Exhibit 7) on April 10, 1948. These dates are confirmed by concession of priority in the file wrapper of the patent in suit (Exhibit G).

6.

Following the first sale by the Plaintiff U. S. License Frame Mfg. Co. of license frames embodying the design invention of the patent in suit, said Plaintiff continued to manufacture and sell said license frames, and in spite of the fact that their selling price was higher than other designs sold by

Plaintiff, said sales continued to increase over the years with respect to and until they surpassed other designs of license frames manufactured and sold by plaintiff. Said license frames embodying the design of the patent in suit were substantially copied by numerous competitors in the field. This commercial acceptance by the trade of license frames embodying the design of the patent in suit and particularly the widespread copying thereof by competitors strengthens the presumption of validity attaching to the issuance of the patent.

7.

The design of the patent in suit embodies what has since come to be known in the trade as a double-header license frame comprising a basic frame structure of generally rectangular shape having upper and lower indicia carrying inserts therein. In the frame of Plaintiff's design, one of said inserts is slightly enlarged over the normal width of the basic frame structure and extends inwardly of the frame and centrally thereof. The other insert is enlarged both inwardly and outwardly and is likewise centrally [18] spaced with respect to the sides of the frame. In each instance, the surface texture of the insert contrasts with that of the remaining portion of the frame and the entire frame is balanced and streamlined, the over-all appearance resulting in a new and ornamental design when viewed by the ordinary observer. Plaintiff's design is exemplified by Exhibits 3, 3A, 4 and 4A, it being customary in the trade to have the larger of the inserts on either the top or bottom as the customer may require.

8.

On or about September 2, 1952, the Defendant Robert W. Brown, shortly prior to the issuance of the patent in suit, became a sales representative of Plaintiff U. S. License Frame Mfg. Co., selling Plaintiff's license frames to the trade, the orders for said frames being filled by Plaintiff and billed directly by Plaintiff to the customer, payment for said frames being made to Plaintiff. One of the orders taken by Brown and submitted to Plaintiff during their association was from Eddie Nelson, an auto dealer in Huntington Park, California. Exhibits 3 and 3A illustrate the frames supplied by Plaintiff to Eddie Nelson pursuant to said order, which called for partial shipments over a period of months.

9.

On or about November 17, 1952, disagreements having arisen between the Plaintiff U. S. License Frame Mfg. Co. and the Defendant Robert W. Brown, the latter's association with Plaintiff was terminated. Shortly thereafter, in or about January, 1953, the Defendant Brown set up his own manufacturing facilities for license frames, which business was incorporated in July, 1953, as the Defendant Robert W. Brown & Co., Inc. Shortly after establishing his manufacturing business, the Defendant Robert W. Brown and thereafter the Defendant Robert W. Brown & Co., Inc., supplied license frames to Eddie Nelson [19] in Huntington Park, exemplified by Plaintiff's Exhibits 2 and 2A, the undelivered balance of the Eddie Nelson order

placed with U. S. License Frame Mfg. Co. having been cancelled by Brown after he set up his own business.

10.

The license frames exemplified by Exhibit 2 sold by Robert W. Brown and Robert W. Brown & Co., Inc., to Eddie Nelson and others are substantially identical with the patent in suit, Exhibit 1, and frames made by Plaintiff thereunder as exemplified by Exhibits 3 and 3A. Said frames sold by Defendants incorporate the new and ornamental design of the patent in suit, are in all respects substantial duplicates thereof, embody the invention of said Letters Patent, and are an infringement thereof.

11.

The defendants had actual notice of their infringement of the patent in suit, but continued to jointly and severally, infringe said patent by making and selling and causing to be made and used and sold, license plate frames embodying the invention covered by said patent.

12.

The Defendants Robert W. Brown and Olive W. Brown are respectively President and Treasurer of the corporate Defendant Robert W. Brown & Co., Inc. Robert W. Brown of record the sole stockholder of said corporation and has personally instigated, directed, controlled and induced and does now direct, control and induce the infringements committed by said corporate Defendant, and said

individual Defendant, Robert W. Brown, at all times was and is in personal and direct charge and control of all activities of said corporate [20] Defendant.

As documentary evidence of the prior art, Defendants introduced into evidence Exhibits G1, G2, G3, H, I, J, M and N, of which Exhibits G1, G2 and G3 are the file wrapper reference patents to Watts, Griffith and Overton cited and considered by the Patent Office Examiner in his examination of the patent in suit. Said file wrapper reference patents do not anticipate or negative invention of the patent in suit and the Examiner did not err in allowing and issuing said patent.

14.

As to the other documentary exhibits submitted by Defendants as prior art, the catalogue Exhibit J and the Orestor and McRuer patents, Exhibits M and N, are not as relevant as the patents relied on by the Examiner and in no way disturb the validity of the patent in suit. The Gazan patent, Exhibit H, is later in point of time and therefore not prior art against the patent in suit. The Gazan file wrapper, Exhibit I, is relevant only to show that the Patent Office fully considered all issues raised in connection with the Gazan and Bessolo patents and decided same in favor of the Bessolo patent in suit.

15.

The defendants took the deposition of Stanley M. Olson in Minneapolis, Minnesota, on January

19, 1956, which was read and offered in evidence as Defendants' Exhibit A, the exhibits attached thereto being numbered A1 to A15, inclusive. While the proofs offered in said deposition leave much to be desired as to evidential value, the date on Exhibit A2 being 1949 and the date on Exhibit A3 having obviously been changed from 1949 to 1947, no date having been offered or proven for the catalogue sheet Exhibit A1 or the license frames Exhibits A5, A10, and A15, the evidence was nevertheless admitted. The [21] witness Olson admittedly was an interested witness since his company, the Douglas Company, had previously been charged with infringement by plaintiff. The evidence also shows that the Douglas Company at one time was a distributor of plaintiff's license frames.

16.

Taking the Olson deposition at its face value and conceding that license frames similar to those illustrated by the undated Exhibits A1, A5, A10 and A15 were in fact sold by the Douglas Company early enough to be prior art against the patent in suit, nevertheless they do not anticipate the ornamental design of the patent in suit, which demonstrates invention over said exhibits. The license frames illustrated in Exhibit A1 and before the Court as Exhibits A5, A10 and A15 are simple stampings with silk screen lettering thereon, the over-all appearance of which is materially different from that of the license frames sold by plaintiff under the patent in suit.

17.

The so-called Cobb frame illustrated in Exhibit A1 as No. 101AA, allegedly sold in December, 1947, is in all material respects a substantial duplicate of the frames shown in the Watts patent, Exhibit G1, cited and considered by the Examiner during the prosecution of the Bessolo patent in suit. While the picture of the Cobb frame 101AA shows lettering on both top and bottom of the frame, the Watts patent shows in Figure 1 a frame with lettering on the bottom and in Figure 2 a frame with lettering on the top, it being obvious that Watts contemplated lettering on either or both top and bottom in a single frame. The Bessolo patent in suit clearly demonstrates novelty and invention over the Cobb frame 101AA which is no more relevant to the question of validity of the patent in suit than the Watts patent Exhibit G1. Exhibit A5 frame, which the witness Olson testified was substantially the same as the [22] Cobb frame obviously differs therefrom and is not in fact a 101 frame but some other and later frame not even shown on the catalogue sheet Exhibit 1. There is no evidence whatsoever that frames made according to Exhibit A5 were made or sold prior to March 6, 1948, the effective date of the patent in suit.

18.

The Douglas frames No. 102 illustrated by Defendants' Exhibits A1, A10 and A15 which Olson testified were first sold in January, 1948, are in all material respects the same as the frames illustrated in the file wrapper reference patents G3 and

G2. The frame of the Overton patent Exhibit G3 with its downwardly - extending center section, is substantially the same as Defendants' Exhibit A10 and is a reversal of Exhibit A15, which is itself merely a reversal of Exhibit A10. Similarly, the Griffith patent Exhibit G2 is substantially the same as Exhibit A15 and a reversal of Exhibit A10. Defendants' Exhibits A1, A10 and A15 are no more relevant, and in some respects less relevant, to the patent in suit than are the file wrapper reference patents to Griffith and Overton, Exhibits G2 and G3. None of said exhibits shows the ornamental design of the Bessolo patent and none of said exhibits, taken singly or in combination, supports defendants' contentions of lack of novelty and invention.

19.

The testimony concerning the manufacture and sale of license frames, Exhibits C, D and K, prior to the invention of the patent in suit, is not convincing. At best, it merely shows the existence of two-cavity master dies which might have been used to produce said frames but which were equally suitable for and were commonly used to make other and different kinds of frames of varying sizes to meet the requirements of various state laws. Master dies are made for the express purpose of permitting the manufacture by the use of but one die of many different kinds of frames. The evidence as to the [23] use of such dies before the patent in suit to make frames of any particular design and specifically frames similar to Exhibits C, D and K

is neither convincing nor persuasive. The evidence as to said exhibits does not disturb the validity of the patent in suit which clearly discloses and claims a new and ornamental design.

Conclusions of Law

1.

This action arises under the patent laws of the United States and this Court has jurisdiction thereof under 28 U.S.C. 1338(a).

2.

Design Patent No. D-167,878 was duly and legally issued on October 7, 1952, and is good and valid in law.

3.

The plaintiff, Leonard DeBell, is the owner of the entire right, title and interest in and to said Letters Patent and all rights of action for past infringements thereof.

4.

The defendants have infringed Design Patent No. D-167,878 by manufacturing and selling license frames exemplified by Exhibits 2 and 2A.

The plaintiff, Leonard DeBell, is entitled to judgment for a permanent injunction and an accounting with costs.

/s/ PEIRSON M. HALL,

United States District Judge.

RWF/bdj

[Endorsed]: Filed March 2, 1956. [24]

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 16056-PH

LEONARD DeBELL (Substituted for U. S. License Frame Mfg. Co.),

Plaintiff,

vs.

ROBERT W. BROWN & CO., INC.; ROBERT W.
BROWN and OLIVE W. BROWN,

Defendants.

JUDGMENT

This cause having come on to be heard and the Court having made and entered its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed:

1.

That U. S. Design Patent No. D-167,878 was duly and legally issued on October 7, 1952, and is good and valid in law.

2.

That plaintiff, Leonard DeBell, is the owner of said Letters Patent, together with all rights of action for infringement thereof.

3.

That the defendants Robert W. Brown and Co., Inc.; Robert W. [27] Brown and Olive W. Brown have infringed said Letters Patent No. D-167,878

by the manufacture and sale of license frames exemplified by Exhibits 2 and 2A in evidence.

4.

That plaintiff have judgment on his Complaint for infringement of said Letters Patent No. D-167,878.

5.

That a writ of permanent injunction issue out of and under the seal of this Court in usual form, enjoining said defendants and each of them and their officers, associates, agents, employees and those in active concert or participation with them from infringing said Patent No. D-167,878.

6.

That the plaintiff, Leonard DeBell recover from said defendants' general damages which shall be due compensation for said infringement by defendants, and that this cause be referred to Theodore Hocke, Esq., as special master to ascertain such damages and report the same to this Court.

7.

The plaintiff recover from said defendants, and have execution for, his taxable costs in the amount of \$.....

Dated this 1st day of March, 1956.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed March 2, 1956.

Docketed and entered March 2, 1956. [28]

United States District Court, Southern District
of California, Central Division

LYON & LYON, ESQS.,
811 West 7th St.,
Los Angeles 17, Calif.

FULWIDER, MATTINGLY &
HUNTLEY, ESQS.,
5225 Wilshire Blvd.,
Los Angeles 36, Calif.

Re: DeBell v. Robert W. Brown & Co.,
et al., No. 16056-PH.

You are hereby notified that judgment has been
docketed and entered this day in the above-entitled
case.

Dated: Los Angeles, California, March 2, 1956.

CLERK, U. S. DISTRICT
COURT,

By C. A. SIMMONS,
Deputy Clerk. [29A]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Robert W. Brown
& Co., Inc.; Robert W. Brown and Olive W. Brown,
defendants above named, hereby appeal to the
United States Court of Appeals for the Ninth Cir-

cuit from the judgment entered in this action on the 2nd day of March, 1956.

Dated: This 2nd day of April, 1956, at Los Angeles, California.

LYON & LYON,

JOHN B. YOUNG,

By /s/ JOHN B. YOUNG,

Attorneys for Defendants.

Affidavit of service by mail attached.

[Endorsed]: Filed April 2, 1956. [30]

In the United States District Court, Southern
District of California, Central Division

No. 16056-PH

LEONARD DeBELL (Substituted for U. S. License Frame Mfg. Co.),

Plaintiff,

vs.

ROBERT W. BROWN & CO., INC.; ROBERT W. BROWN and OLIVE W. BROWN,

Defendants.

Honorable Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

January 31, 1956

Appearances:

For the Plaintiff:

FULWIDER, MATTINGLY &

HUNTLEY, By

ROBERT W. FULWIDER, ESQ.; and

WILLIAM K. YOUNG, ESQ.

For the Defendants:

LYON & LYON,

JOHN B. YOUNG, ESQ.

* * *

Mr. Fulwider: I desire to offer the patent in suit as Plaintiff's E, the Bessolo patent.

(The patent in suit referred to was marked Plaintiff's Exhibit No. 1 in evidence.) [6*]

* * *

I would like to introduce in evidence at this time that particular frame that I am speaking of, which was Exhibit 2 in the Brown deposition. We will offer it here as Plaintiff's Exhibit 2.

The Court: That is the Eddie Nelson frame?

Mr. Fulwider: That is the Eddie Nelson frame. It is white raised letters on a red background, and on the rear of it the notation, "Robert W. B-r-a-u-n & Co.," which was a misspelling of his name.

I don't know whether you want to keep the tag or not, Mr. Clerk. Perhaps it won't do any harm.

The Court: That is admitted.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Fulwider: I want to offer a photograph of Exhibit 2 [11] which perhaps we can mark as Exhibit 2-A. We have photographs of these various frames and I thought it might facilitate matters if we also had them marked.

The Court: Admitted.

(The photographs referred to were received in evidence and marked Plaintiff's Exhibit No. 2-A.)

Mr. Fulwider: As Exhibit 3 I would like to offer in evidence so the Court at this time can see the visual evidence of what I am discussing, one of the Eddie Nelson frames supplied by U. S. License Frame Company as a part of that order that I just mentioned.

This carries a little tag called Exhibit B. This will be Exhibit 3.

The Court: That is the plaintiff's Eddie Nelson frame?

Mr. Fulwider: That is right, your Honor.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Fulwider: Exhibit 3 was a frame supplied by plaintiff when the Nelson order was cancelled. Exhibit 2 is the frame thereafter supplied by the defendant.

We have a photograph of Exhibit 3 which I

would like to have marked as 3-A, and offer it in evidence.

The Court: Admitted.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 3-A.) [12]

* * *

Mr. Fulwider: * * * I would like to offer in evidence two representative frames similar to the Eddie Nelson but varying somewhat, one showing the large header at the top. The Eddie Nelson frame shows the large header at the top. The Eddie Nelson frame shows the large insert at the top, which is the patent in suit just upside down, and it is conceded by all parties that it is customary in the trade, as the customer desires, either to supply them with the large insert on the bottom or the large insert on the top. The holes are uniform so they can work either way.

I would like to offer as Exhibit 4 this frame, which has a large insert, Phil Hall, Hollywood, in the small one, as another frame put out by the Robert Brown Company. It has his name pressed on the back. It has the two inserts arranged exactly as in the patent in suit.

The Court: That is another Brown frame?

Mr. Fulwider: Yes.

The Court: Admitted. [13]

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Fulwider: We have a picture of that which

I would like to offer as Exhibit 4-A showing the Brown Exhibit 4.

The Court: Admitted.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 4-A.) [14]

* * *

PAUL D. HUCKELBURY

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please. [25]

* * *

Direct Examination

By Mr. Young:

Q. Mr. Huckelbury, will you tell us the name of your employer? A. B. J. Audet.

Q. The name of your company?

A. The Benmatt Organization.

Q. What business is the company in?

A. Manufacturing license plate frames and die cast name plates.

Q. How long have you been with the company?

A. I have been in the manufacturing frames business over 20 years.

Q. How long have you been with the Benmatt organization?

A. Since he bought the company—I don't remember the year—about eight or nine years ago.

Q. Did that happen during the war?

(Testimony of Paul D. Huckelbury.)

A. No, I think it was after the war.

Q. Were you with the predecessor of the company? A. Oh, yes.

Q. You have been continuously, then, in the same business for 21 years? A. Yes.

Q. What are your duties now with the company? [26] A. Plant superintendent.

Q. What do you do as plant superintendent?

A. Well, I regulate the production of the plant and I operate the plant.

Q. Are you familiar with the license plate frame that the company makes? A. Yes.

Q. Have you been familiar with the license plate frames during this entire 21 years? A. Yes.

Mr. Young: I hand you a plate which we will mark——

The Court: C for identification.

(The exhibit referred to was marked Defendants' Exhibit C for identification.)

Q. ——which will be marked C for identification, and ask you to observe it.

A. (Examining exhibit.)

Q. Can you identify that license plate frame?

A. Yes.

Q. Who made it? A. We did.

Q. The Benmatt Organization?

A. At that time the Shehan Manufacturing Company manufactured this plate. [27]

Q. Do you know when that frame was manufactured?

(Testimony of Paul D. Huckelbury.)

A. This particular frame, I don't know when this particular frame was made, no.

* * *

The Court: You made this frame?

The Witness: Yes, but I don't know the date that that particular frame was made. We made frames just exactly like that in 1938, but I don't know whether it is that dealer, but we made several for several different dealers and I can't remember their names.

The Court: What are these, key numbers on the back, [28] 650 stamped in here?

The Witness: That is our style number.

The Court: Go ahead, counsel.

Q. (By Mr. Young): Mr. Huckelbury, would you call this a 2-line frame or a double header frame? A. They are called both.

Q. Is there any distinction in the manufacturing techniques that is important here?

A. Not necessarily.

Q. At the present time with the Benmatt Organization, are these 2-line frames more popular than 1-line frames?

A. Well, I wouldn't know exactly. Some months we run 70 per cent or 80 per cent of our production in 2-line frames, other months we run 20 per cent of our production, so it would be hard for me to say what percentages we do run them in. [29]

* * *

(Testimony of Paul D. Huckelbury.)

Q. (By Mr. Young): I hand you a license plate indented as Exhibit D and ask if you can identify that? A. Yes. [31]

Q. Do you know who made that license plate frame? A. Yes.

Q. Who did?

A. We did, the company I work for.

Q. Was the company Shehan Manufacturing Company at that time or the Benmatt Organization? A. Shehan.

Q. Do you recall anything about the construction of the dies for that plate?

A. I don't know exactly what you are referring to.

Q. Do you know who made the dies for that plate?

A. I believe the Ace Stamp and Stencil made it, I am not sure of that.

The Court: It says here, "Dura Products Manufacturing Company, Canton, Ohio."

The Witness: They were a distributor of ours and we stamped their name on every part we manufactured for them. It is right in the die. We still have the die.

Q. (By Mr. Young): Do you know if that part was made and sold before the war?

A. Yes, it was.

Mr. Fulwider: May I ask for clarification? Counsel says "that part." He doesn't mean this particular frame, Exhibit D, does he? [32]

Mr. Young: I do not mean that particular

(Testimony of Paul D. Huckelbury.)

frame, but frames identical to that made from the same die.

The Witness: Yes. We still have the dies.

The Court: You say, "before the war." Which war?

Mr. Young: Your Honor, I was referring to the Second World War.

Q. Would your answer be the same, Mr. Huckelbury?

A. Yes, it was made in 1941, I believe, right about Pearl Harbor. I don't remember the exact date.

Q. Mr. Huckelbury, do you know why 2-line frames were made instead of single line frames?

A. Why they were made?

Q. Yes.

A. Some people just preferred them. It gives them more advertising copy.

Mr. Young: That is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Fulwider:

Q. As I understand it, your testimony is that you did not have any records to support your testimony as to when the dies for Exhibits C and D were made, is that correct?

A. I don't have access to the records of the Shehan Manufacturing Company.

Q. Do you have any memorandum or written

(Testimony of Paul D. Huckelbury.)

documents [33] at all that you have used to refresh your recollection in your testimony today?

A. No, I do not.

Q. Your testimony that these frames were made prior to World War II is strictly unsupported testimony as of this time? A. That is right. [34]

* * *

Recross-Examination

By Mr. Fulwider:

Q. Mr. Huckelbury, have these frames, Exhibits C and D, been manufactured by the Audet Company, the Benmatt Organization?

A. That is these two frames up here?

Q. Yes. [36]

A. I can't remember whether they were or not. I am pretty sure they have, but I can't remember.

Q. Do you have any records at all to indicate whether or not these dies that you say from which Exhibits C and D were made, were made for the Benmatt Organization or for the Shehan Company?

* * *

The Witness: I don't have any records. We do have the dies, though.

Q. (By Mr. Fulwider): You do have the dies?

A. We do have the dies.

Q. Is there anything on those dies to indicate when they were made?

A. That I don't know. I never did look at them that close, I haven't in so many years.

(Testimony of Paul D. Huckelbury.)

Q. But you don't know yourself whether or not the [37] dies from which the frames C and D were made, were made before or after Benmatt took over or Audet took over the Shehan Company, do you?

A. I don't have any records but I do know they were manufactured because I worked for the company and produced the parts myself.

Q. It is solely your unsupported recollection, as of this time, is it not?

A. As of this time, yes.

Mr. Fulwider: That is all.

* * *

PAUL EDWARD LENK

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Young:

Q. Mr. Lenk, would you state the name of your employer, the company you work for? [38]

A. I am the president and principal stockholder of the Ace Stamp and Stencil Company.

* * *

Q. (By Mr. Young): I show you Exhibit D and ask if you have ever seen that frame? [39]

A. Yes, I have.

Q. Have you seen that identical frame?

A. Yes. In fact, I was the one who gave you this frame.

(Testimony of Paul Edward Lenk.)

Q. Where did you get that frame?

A. I searched through some old shots from dies, old samples, old parts, and I was able to find this some six months ago. The particular part I can attribute to a definite time that it was made.

Q. What time was it made?

A. This particular frame was shot in January of 1942. I can't specify the exact date, but during the month of January, 1942. The very first shot off the die produced this frame.

Q. For what order was that frame, do you know?

A. This order was for the Shehan Manufacturing Company.

Q. The Shehan Manufacturing Company employed your concern to make that frame?

A. To manufacture the dies. The dies is the product that produces this frame.

The Court: Do you make the die, then you make what you call a shot off of it, and keep the shot and send them the die?

The Witness: In this particular case, no, we make the [40] dies. We do not have die casting facilities. The customer when billed—usually the die here accompanies the die to the purchaser and we guarantee, or we will say, the manufacturer of dies guarantees that the die will produce acceptable merchandise. So in order to substantiate presenting a bill for the merchandise we must normally accompany the die and as long as the first article

(Testimony of Paul Edward Lenk.)

—what we call the first article—is acceptable then we present our invoice for payment. We take the first article from the die as physical evidence in case there is any question as to dimensional sizes, the weight of the object, and so forth. There are certain things that you must guarantee in a die to produce and this is your physical evidence.

The Court: So you keep that?

The Witness: So we keep that, yes.

Q. (By Mr. Young): I hand you Exhibit C and ask you to look at it carefully. Do you know who made dies for that frame?

A. We made the original die that this part came from, and also modifications to the original die.

Q. Do you know when that particular frame that you hold in your hand was made?

A. This frame, I cannot establish the month but I can establish the year.

Q. What was that year? [41]

A. I will say this is probably 1940.

Q. Was it before or after the Second World War? A. Yes, it was.

Q. Do you know who you sold those parts to?

A. The insert, you mean?

Q. Yes, the dies and insert.

A. The dies and the inserts were sold to the Shehan Manufacturing Company.

Q. The same company as Exhibit C?

A. Correct.

Q. Do you know when the first shot was made from the original die that you made?

(Testimony of Paul Edward Lenk.)

A. It would be prior to that time, perhaps 1933.

Q. Did the original die differ, or would it produce a part any different, from what you hold in your hand? A. Yes, it would.

Q. Would you explain that difference?

A. When this die was first made it was to produce a single line or a single insert license frame. We made what was then known as a competition frame, one very light, where the amount of material was the least possible. Unfortunately Shehan Manufacturing Company, when they received this frame it was not readily acceptable.

The Court: That is the single line?

The Witness: The single line. And at this time it had [42] just a plain top. As an item, it wasn't sold except in very, very small quantities. So this die was built primarily for what they call the booster frame or competition frame.

Q. And that was made—— A. In 1938.

Q. I mean the 2-line.

A. In 1940. The die was then completely recut, inserts were made—which we call these insert, locator lines—in which the entire die was recut and we ran reinforcement in the back and we made provision for both top and bottom.

The reason for that, in some of the models of cars it was necessary—I believe it was introduced before—to use this frame in several manners, either this way or the other way (illustrating).

We had in certain models of cars a certain defi-

(Testimony of Paul Edward Lenk.)

nite over-all height to maintain and that was 7 1/16 inches. I remember that very distinctly.

Q. Mr. Lenk, is there any limitation as to how close the two parallel sides of the frame may come together? What is the minimum clearance for a California frame?

A. If I remember correctly, the California Vehicle Code states that no portion of the lettering can be covered by the frame. That would render the lettering illegible, I believe. [43]

Q. You have spoken of the Shehan Manufacturing Company. Do you know a man named Godfrey Bell?

A. I am very well acquainted with Mr. Bell, yes.

Q. Did you do business with Mr. Bell at the same time you are speaking of here in connection with the alteration of that die?

A. We did business with Mr. Bell only in that Mr. Bell acted in an executive capacity. I dealt primarily through his sales manager and his general superintendent.

Q. As of 1950, let me say, were you making 2-line die frames?

A. Well, as of 1950 we were still making license frame inserts, but we were no longer building dies, that is, the over-all dies.

The Court: What do you mean license frame inserts?

The Witness: Your Honor, these are the lettered or engraved pieces of steel that produce the lettering or the insignia, as the case may be.

(Testimony of Paul Edward Lenk.)

The Court: They are made separately?

The Witness: They are interchangeable. They are separate and they are interchangeable.

In other words, instead of "La Jolla" we could have "Los Angeles," "San Diego," "Bakersfield," or any other city in the State of California that they have orders to fill. In other words, this could be the Jones Company at Los Angeles [44] as well as at La Jolla.

The Court: You use the same die?

The Witness: The same basic die, which is not changed except in the years in which the over-all frame die was changed, which was done right after the war.

Your Honor, the major over-all dies are very expensive, and that is the principal reason for making interchangeable inserts, to reduce the initial cost, or the cost to the customer who buys the advertising value of the frame.

The Court: What are your dies made of?

The Witness: Of tool steel. The inserts are of milled steel, usually 10-20, 10-30 steel.

Mr. Young: Would you mark this, please?

(The exhibit referred to was marked Defendants' Exhibit E for identification.)

Q. (By Mr. Young): I hand you Exhibit E. for identification and ask you if that is a sample of an insert die?

A. This is a sample of an insert commonly used.

(Testimony of Paul Edward Lenk.)

Q. Did you make that particular insert?

A. No, I did not.

Mr. Young: I offer this in evidence.

(The exhibit heretofore marked Defendants' Exhibit E for identification was received in evidence.)

Mr. Young: Your Honor, I would again like to offer [45] Exhibits C and D in evidence as the dies, or rather the frames that Mr. Lenk has identified as making the dies for.

Mr. Fulwider: We still object as not sufficiently proven except by oral testimony.

The Court: Overruled. They are admitted in evidence. Exhibits C and D are admitted.

The Clerk: Are they still restricted?

The Court: No, they are admitted in evidence for all purposes.

(The exhibits heretofore marked Defendants' Exhibits C and D for identification were received in evidence.)

* * *

Q. Do you know whether Exhibit C or D was made for [46] that company?

A. Is this Exhibit C and D?

Q. I am speaking of this one (indicating).

A. No. Neither one of these dies were made for the A-1 Venetian Blind Company or Dura Products Company.

(Testimony of Paul Edward Lenk.)

The Court: He has testified that they were both made for Shehan Manufacturing Company.

The Witness: That is correct.

Mr. Young: That is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Fulwider:

Q. Mr. Lenk, is there anything on Exhibit C that indicates when it was made?

A. The only thing that might tie in with records, there is nothing that indicates to me other than this small A-1, which indicates the model or the die which this was produced from.

Q. A-1 is the number given to the die?

A. That is the designation as the A-1 die.

Q. Do you have that die?

A. I do not. You will remember we delivered these to the customer. The customer has it.

Q. Do you have any records as to when the A-1 die was made? [47]

A. I am sorry, we don't. We went into the defense business since 1950 and they have all since been destroyed. It was only through sheer luck that I found that Exhibit D, the frame itself.

Q. Now, this Exhibit C, this particular exhibit, when do you say it was made, this frame that you are holding in your hand?

A. This one I established in 1940, I am quite sure.

(Testimony of Paul Edward Lenk.)

Q. This particular frame?

A. No, we will say——

Q. This one I have in my hand, this was made in 1940?

A. No. I will retract that statement, because there is nothing on this that would identify an article of similar nature that could be produced at a later date. I will say articles similar to that. In other words, we will say a die can run for many, many years. The article produced, we will say today, should be in theory the same as produced when the die was first made, less certain wear and tear.

Q. You have no knowledge as to whether this particular exhibit that I hold in my hand, Exhibit C, as to when it was made, do you?

A. No. But I will make the statement that a frame similar to that, or with essentially the same reading matter, was produced in 1940.

Q. When did you first see this particular frame, [48] Exhibit C?

A. About two hours ago.

The Court: Your testimony is that the die from which Exhibit C was made was made by you?

The Witness: That is correct.

The Court: In 1940?

The Witness: After a die is delivered and the first article is made I have no further recollection or I have no particular interest in the die. It is then accepted by the customer and it becomes his property and it is his business what he does with the die.

Q. (By Mr. Fulwider): Have you made a

(Testimony of Paul Edward Lenk.)

search to find the records to support your testimony that the die A-1 was made when you say it was made?

A. I went through the records. We have no records in our plant now that would be prior to 1950 of any job orders or invoices.

Q. So that it is your testimony that the A-1 die was made prior to 1950 is entirely your own present unsupported recollection?

A. That is correct.

Q. And you have not referred to any memoranda or any notes or any records to refresh your recollection?

A. The only item that stands very vividly in my [49] memory is that—Exhibit D, I believe it is, the shell frame——

Q. We will go into that in a minute. Let us finish up on Exhibit C here first.

We will renew our objection that we made before that Exhibit C is merely illustrative of what this witness says that he made a die some 20 years ago.

The Witness: Numerous dies.

Mr. Fulwider: I mean this die A-1.

The Court: No, his testimony is flatly that he made the die for that frame in 1940.

Mr. Fulwider: Yes, that is the way I understand it.

The Witness: Or a frame exactly like it. Maybe not that particular one.

The Court: You do not know whether they used

(Testimony of Paul Edward Lenk.)

different inserts, then, or not. Did you make inserts for the dies?

The Witness: Yes, the insert submitted a moment ago was not our particular product.

The Court: But it is the same general idea?

The Witness: Generally speaking, yes, your Honor.

The Court: So what you made was a blank die, or a die that would produce a blank product on which an insert could be made?

The Witness: With that configuration; yes, sir.

The Court: In 1940? [50]

The Witness: In 1940 or prior to 1940. The inserts may not have been used immediately upon receipt.

The Court: Objection overruled.

Q. (By Mr. Fulwider): You don't know, do you, Mr. Lenk, as to whether this particular frame I hold in my hand, Exhibit C, was made from the particular die A-1 that you made or you say you made and sold to Shehan, do you?

A. Granted, although it isn't feasible for a company to spend money twice for an item, particularly the expense which these dies run.

The Court: Is the A-1 your marking?

The Witness: Yes, that is ours.

The Court: Then there are those numbers at the top and bottom.

The Witness: These are not ours. Those are primarily the manufacturer's own identification as to the style.

(Testimony of Paul Edward Lenk.)

This also, your Honor, is inserted in the back, and we call it the female or the cavity side of the male or cold side of the die is changed also.

In order to identify for their own purposes, probably for sales records, this is changed at the same time. These are removable. These are what we call interchangeable inserts.

In other words, this style, your Honor, could have an [51] emblem or two emblems. In other words, we have built some 20,000 inserts in various adaptations for the frames throughout the United States. We are one of the largest producers of dies at one time to my knowledge in the whole United States of this particular product.

Q. (By Mr. Fulwider): You cannot say from your own knowledge that this little raised indicia here, A-1, was put there or comes there solely because it was on a die that you made that you call A-1?

A. No. In other words, a customer will ask us to identify a die normally. It is entirely feasible that they could have asked for it to be D-2 or any other number. But for their own records, or in other words they will specify a die is A-1 or something else. This I remember because it was a booster die and it was later changed.

Q. This A-1 wouldn't have to have come from a die you made, would it? In other words, once you delivered a die to a customer he could put A-1 on there, could he not, on the die? A. He could.

Q. Or anything else he wanted?

(Testimony of Paul Edward Lenk.)

A. Well, he did this, that is correct (indicating).

Q. Yes. In other words, the customer puts on all this indicia up here as to the style number? [52]

A. Yes.

Q. Now it is equally feasible that a customer could put anything on the side he wants to, isn't it?

A. In other words, to do so he would have to weld this up and recut and then restamp, and I don't believe the die shows evidence of mutilation or changing.

I will say that there isn't anything that isn't possible, but let's say it isn't feasible.

Q. Now the A-1, as I understand it, then, merely applies to the outline portion of the frame?

A. No, all it identifies is that it is a California license frame and that it was the booster type or the light weight frame. That is all it actually identifies.

Q. So the A-1 doesn't mean whether it is a 1-line or a 2-line? A. No, that is true.

Q. Nor does it indicate whether the insert was curved like this Exhibit C or straight across?

A. None whatsoever.

Q. Or even like the Shell, Exhibit D?

A. That is right. It just merely identifies primarily a size and a state. In other words, the size indicating the over-all length, the location of the holes, what we call the lugs, the lugs and lug holes and the frame, the general configuration of the frame. But this particular die will make [53] several designs of frames of this weight and thickness.

(Testimony of Paul Edward Lenk.)

There are other California frames of the same general size, but the thickness and the lugs will change and the design of that is different.

Q. So that the A-1, your die number appearing on the end of Exhibit C, goes only to the style of the frame without regard to what kind of inserts it has?

A. That is correct.

Q. Or how many, or what size it is?

A. That is correct.

Q. So if you had one for a different state, a different size, you would have a different indicia?

A. It might be M-1 or M-2, or something of that nature.

In other words, this is primarily to identify, I believe, in manufacturing for companies who produce license frames for more than one state.

Now, the Shehan Manufacturing Company produced license plates for, if I remember correctly, I believe it was 32 states. I will not make a definite statement on that, but I do believe it was 32 states that were covered by license frames. This just identifies the die that would cover the State of California.

Q. There is nothing else on that frame that indicates your manufacture or the particular die, is there?

A. No, the die itself may contain our insignia, but [54] not inasmuch as this is the customer's product and our name should not appear on the customer's product.

Q. Once you make the die and it goes out of

(Testimony of Paul Edward Lenk.)

your possession, and that is merely what we should call a general form die, then the customer——

A. No, it is a specific form die. It does a specific job.

Q. For a specific size, or one size?

A. That is correct.

Q. And then you supply the customer any number of different inserts or other things that he wants to use?

A. The general name is called headers, but headers with inserts. For example, this particular frame doesn't have the second header—I am sorry, it does too—this frame has both headers and inserts, interchangeable headers and interchangeable inserts, and this insert or header will be interchangeable this way and this way (illustrating).

Sometimes it is necessary, from the standpoint of strength, to increase the size of one to another.

Q. Now, there is nothing on this frame, Exhibit C, to indicate that you made this particular La Jolla header for Shehan, is there?

A. Other than that the style of the header is rather characteristic, we will say, of our particular style of engraving. But I could not make a definite statement that we [55] made this specific insert, other than it carries our characteristics.

Q. And that is true of the lower header, I take it, the La Jolla? A. That is correct.

Q. The lettering is generally like yours?

A. That is right. It carries our characteristics.

Q. Beyond that you have no knowledge as to

(Testimony of Paul Edward Lenk.)

whether the particular header, La Jolla, or this particular header——

A. Which La Jolla are you referring to?

Q. One is “La Jolla Chevrolet” and the other “La Jolla” without anything. Now you don’t know whether that was made by you or somebody else?

A. That is correct.

Q. Or when it was made?

A. We could establish, if we were able to get the inserts to see if they matched, and if your indicia was on the insert then I could establish that we made this particular insert. But at present I don’t have the evidence to substantiate it.

Q. Now with respect to Exhibit D, is there anything on this frame, Exhibit D, that indicates to you that it was made from a die made by you?

A. Other than I mentioned a few moments ago, that I stood by the die casting machine when that particular frame [56] was cast.

Q. In other words, you have a present recollection that you made a frame with a Shell insignia on top of it?

A. We built the dies. The die was built on Pearl Harbor Day. That is why I remember it very specifically, the day that we were bombed at Pearl Harbor.

Q. But there is nothing on this frame here to indicate that?

A. No, there would be nothing to indicate other than my personal knowledge and recollection.

(Testimony of Paul Edward Lenk.)

Q. Do you have any records or anything that substantiates that?

A. I will go back to my original statement, nothing prior to 1950.

Q. Now this doesn't carry any die number, does it?

A. No, this die was built specifically for the Shell Oil Company, and it was—I believe the price of the tooling was amortized into the price of the merchandise.

Q. Was this sold to Shehan Manufacturing Company also? A. Yes.

Q. Did you make the die for the shell, the picture of the shell?

A. Yes. In fact, if you so desire, that master—we call it a master—of the engraving is available at our plant. [57]

The Court: The engraving?

The Witness: Your Honor, whenever we do what we call a profile, that is, in which the letters or configuration carries a 3-dimensional plane, it is necessary to make first a mold, either in the correct form or the inverted form. That, in turn, is duplicated on a machine called a panographic or mechanical duplicator, and in most cases where we have had to make molds or masters those will be kept, and I am positive that that is at the plant.

The Court: That you have it yet?

The Witness: Yes, and if it is necessary I will produce the same. [58]

(Testimony of Paul Edward Lenk.)

Recross-Examination

By Mr. Fulwider: [61]

* * *

Q. As I remember your testimony, the only thing that made you think that you perhaps supplied the inserts "La Jolla" for frames similar to Exhibit C was that the lettering was similar to yours?

A. That is correct. The lettering bears the style design that we normally use.

The only manner in which I can positively identify that this particular frame was cast from our inserts would be to see inserts that we produced to see if they matched identically, less the shrinkage.

Q. You have no recollection or knowledge as to when you made the La Jolla inserts for Shehan or anybody else?

A. Not specifically other than it will be dated, because during different years changes are made. There are certain modifications on dies and die inserts, what we call headers, that make this die inoperative in previous dies. That is possible and has happened numerous times.

For example, if for any reason this center distance between the lug locations changes, and we will say that they become smaller, the distance becomes shorter, this frame or this insert would not be operative in that particular frame. So we will say, for example, that in this particular case—California has not but other states have—they have changed their

(Testimony of Paul Edward Lenk.)

lug locations or the locations of the holes, and in many [62] cases it has only been a distance in which, we will say, it came into the inserts and made it not feasible, so the die had to be revamped and new header plates made and new inserts also with identically the same matter but condensed to fit the new existing space.

Q. But as to these two inserts you have no knowledge as to when, if you made, the insert dies from which these inserts of Exhibit C were made, you have no way of knowing?

A. I have every reason to believe that inasmuch as we made the headers and die modifications.

Q. But you don't know?

A. But I don't know, that is right.

Q. And there is nothing on this exhibit that helps you?

A. That would positively identify it, no.

Mr. Fulwider: I think that clears it up, your Honor.

* * *

CHARLES F. WEBB

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows: [63]

Direct Examination

By Mr. Young:

Q. Mr. Webb, are you here today in response to a subpoena? A. Yes, sir.

Q. That subpoena asked you to bring with you

(Testimony of Charles F. Webb.)

any records that you might have showing construction of dies, is that right? A. Yes.

Q. For a certain date? A. Yes.

Q. What is your occupation, Mr. Webb?

A. I am an engraver. We do engraving and we make an occasional mold.

Q. Do you make frames or dies for license plate frames? A. Yes, we do.

Q. Look at Plaintiff's Exhibits 2 and 3, which I have placed before you, and tell me, if you can, whether you made the dies for either or both of those.

A. (Examining exhibits): We made this [64] one.

Q. And that one that you are referring to is Exhibit 2? A. That is right.

The Court: The Eddie Nelson plate?

The Witness: Yes.

Mr. Young: Your Honor, these are both Eddie Nelson plates.

The Witness: I will look at this one. (Examining.)

The Court: Exhibit 2 is Mr. Brown's plate?

Mr. Young: Yes.

The Witness: We have no identification on this one, but I think we made the die. It looks like our job. We also made the insert. This looks like ours. That I can identify from the insert itself on this one. Unless this one is here I wouldn't know. (Examining exhibits.)

(Testimony of Charles F. Webb.)

Q. (By Mr. Young): Mr. Webb, as a diemaker, would you look at those carefully and tell me whether they came out of the same die cavity, those two plates?

A. (Examining exhibit): Well, no, they didn't.

Q. How can you be sure?

A. Well, there is a difference right here. (Indicating.)

The Court: They are different. I can see it. [65]

* * *

Mr. Fulwider: We will concede they are not.

Q. (By Mr. Young): Mr. Webb, did you bring with you any papers to show when you made the Brown die, Exhibit 2?

A. I have an invoice here.

That is the invoice. (The document referred to was passed to counsel.)

Q. Do you recall the circumstances of the placement of the order for that Brown die, Exhibit 2?

A. Well, he wanted a die made. He gave me this.

Q. By "he" are you referring to the defendant Robert W. Brown?

A. Well, Mr. Brown came in, both Mr. Browns, another Brown, Robert Brown is the one I have been referring to, and he is the one that wanted the die made.

On this job we started out with a drawing on a piece of this cardboard made by——

The Court: By "on this job here" that is Exhibit 2?

Q. (By Mr. Young): You are referring to the Brown exhibit, No. 2? A. This one right here.

(Testimony of Charles F. Webb.)

The Court: Is this your die?

The Witness: I can tell you if I can look at it.

(Examining exhibit.)

The Court: That is Exhibit E. [66]

A. Yes, this is our die. Our name is on the back of it.

The Court: And this is the insert for Exhibit 2, the Eddie Nelson plate?

The Witness: Yes, I am sure it is.

Mr. Young: I will ask the clerk to mark this document, which purports to be an invoice No. 10284, bearing the name R & W Stamp Works as the defendants' exhibit next in order.

The Clerk: Exhibit F.

(The document referred to was marked Defendants' Exhibit F for identification.)

The Court: What is that, the invoice?

Mr. Young: The invoice.

Then I have a shipping memo with the same identification, the shipping memo is white.

The Court: That will be F-1.

(The shipping memo referred to was marked Defendants' Exhibit F-1 for identification.)

Q. (By Mr. Young): Mr. Webb, I hand you Exhibit F and I ask you whether this states on it that it relates to 1 only No. 2 header. $\frac{1}{4}$ by $7\frac{3}{8}$ by $1\frac{1}{2}$. A. You mean it refers to this job here?

Q. Yes, does it refer to that?

A. To the mold, yes, sir. [67]

Q. And do the dimensions——

(Testimony of Charles F. Webb.)

The Court: To "this"?

The Witness: That is the insert.

Q. (By Mr. Young): Do the dimensions I referred to refer to this particular insert, Exhibit E, is that correct?

A. That insert refers to this invoice, $\frac{1}{4}$ by $7\frac{3}{4}$ by $7\frac{1}{2}$.

Q. That would be the actual dimensions of this particular insert, Exhibit E? A. Yes, sir.

Q. You can identify that invoice? A. Yes.

Q. That is the invoice you sent to Robert Brown, is that right? A. That is right.

Q. To pay for work on this particular job, working up the die for Exhibit 2?

A. That is for the mold, yes, sir.

Q. And also for the insert for the mold?

A. No, the inserts are different from the molds. This pertains just to this mold.

The Court: What pertains?

The Witness: This invoice.

The Court: I thought the invoice described this insert, [68] the size of it.

The Witness: This mold has two headers in it.

The Court: I see. To furnish material machinery for California die. That is only one item on here.

This invoice is for the whole business?

The Witness: It is for the mold, your Honor. It is not for the inserts, not for the engraved inserts at all. They are separate from the mold.

The Court: In other words, this invoice does not cover the insert Exhibit E?

(Testimony of Charles F. Webb.)

The Witness: No, sir, this is extra besides the mold.

The Court: And the reason that is on there is——

The Witness: To show the size that he is getting.

The Court: ——to describe the size of the insert for which the mold is made?

The Witness: Yes, your Honor.

The Court: Very well.

Q. (By Mr. Young): I hand you Exhibit F-1 and ask if you can identify that as a shipping memo.

A. Yes, that is.

Q. And you sent that shipping memo to Robert Brown, or that relates to the shipment to Robert Brown?

A. Yes, that is right.

Q. Can you locate anything on this shipping memo that [69] has to do with molds or inserts for Exhibit 2?

A. I don't exactly know what you mean.

Q. Is there an item on this list——

A. That describes this mold?

Q. Yes.

A. Well, the one at the bottom. This says, "1 mold stamped Robert W. Brown." This is the one we made because we made a mistake in the spelling of Brown. It should have been B-r-o-w-n and it is spelled B-r-a-u-n.

I think this is the solid die. This is a solid die. There is cutouts for the inserts in there. There was no header in this die. This is a plain die with just cutouts for the inserts to go in.

(Testimony of Charles F. Webb.)

This probably was a cutout. You see the crease is in here for a header (indicating).

Q. And it is your recollection that Mr. Brown did not bring you a frame and have you build a die exactly like it?

A. No, I don't think he ever did. [70]

* * *

MERLE E. BROWN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows: [72]

* * *

Direct Examination

By Mr. Young:

Q. Mr. Brown, are you connected with the Monarch Die Casting Company? A. Yes.

Q. How long have you been connected with that concern? A. Since 1950.

Q. Did you ever go with Mr. Robert W. Brown, the defendant, to the place of business of Mr. Webb?

A. Yes.

Q. Do you recall what took place at the meeting or meetings with Mr. Webb?

A. It was discussing the making of several die cast molds for license frames.

Q. Did you assist Mr. Robert W. Brown in telling Mr. Webb what you wanted in the way of a die?

A. More in the gating and the die mount and not in the actual cavity.

(Testimony of Merle E. Brown.)

The Court: What is the gating?

The Witness: That is where the metal flows into the casting. [73]

Q. (By Mr. Young): You were concerned more with the technical details of making the dies and the castings rather than the ornamental design, if there was any, of the plates themselves?

A. That is right, yes.

Q. Do you recall that it was a 2-line frame that was ordered? A. I think it was a 2-line frame.

Q. Do you know whether you gave Mr. Webb a frame to copy?

A. If there was any samples submitted, I didn't see them. I don't know if there was any samples.

* * *

JOSEPH C. BESSOLO

called as a witness by and on behalf of the defendants under Rule 43b, having been first duly sworn, was examined and testified as follows: [74]

* * *

Direct Examination

By Mr. Young:

Q. Mr. Bessolo, would you state your [78] occupation, please?

The Court: Let me see. You are calling this witness under the provisions of Rule 43(b)?

Mr. Young: Yes, your Honor, as an adverse witness.

The Court: Is he an officer, director or employee of the plaintiff?

(Testimony of Joseph C. Bessolo.)

Mr. Young: He is the inventor in this case, and he also was an owner up until the time that the ownership was taken over entirely by Mr. DeBell.

The Court: If the plaintiff does not have any objection, it does not make any difference to me.

Mr. Fulwider: I think we have no objection, under the circumstances, because he was a co-plaintiff up until a week or so ago.

The Court: Very well.

Q. (By Mr. Young): Mr. Bessolo, would you state your occupation?

A. I am in the plating business, automotive.

Q. Do you run a plating shop at the present time? A. Yes.

Q. Do you do plating work on license plate frames? A. Yes, I do.

Q. Do you do plating work on other types of things? A. Yes.

Q. Do you do the plating work for U. S. License Frame [79] Company?

A. I did up to about two weeks ago.

Q. Do you consider yourself to be an artist?

A. No.

Q. Are you able to make drawings with pencil or pen?

A. I can make rough sketches, but I don't claim to be a designer.

Q. Did you make drawings which resulted in the design of the patent in suit?

A. Yes, I made rough sketches.

(Testimony of Joseph C. Bessolo.)

Q. Do you know where those sketches are?

A. At the time I don't, no.

Q. You are the Joseph C. Bessolo named as the patentee of the patent in suit?

A. That is right. [80]

* * *

Q. Mr. Bessolo, I hand you exhibits J and J-1——

The Court: What do they purport to be? What is it a photostat of?

Mr. Young: It is a photostat of a Western Auto Supply catalog, and I believe that counsel will stipulate that this was published in 1942 and was found in the Los Angeles City Library.

Mr. Fulwider: We will so stipulate, your Honor.

Q. (By Mr. Young): Mr. Bessolo, on the second page I call your attention to a picture of a license plate holder which shows "Los Angeles" written out on the frame. Do you find that?

A. Right here?

Q. Yes. A. Yes.

Q. I call your attention to the enlargement, J-1, which is enlarged from that portion of this exhibit. Now at the time you made your invention, as you say, Mr. Bessolo, were the single line frames well known and in use in the trade such as shown in this Exhibit J and J-1? A. The single, yes.

Q. Was your company at the time of your invention [88] engaged in making and selling these single line frames? A. Yes.

(Testimony of Joseph C. Bessolo.)

Q. Was the single line available both top or bottom rather than top and bottom?

A. I don't quite remember.

Q. Were they available on the top? Could you buy a frame from your company at that time, at the time of your invention, which had indicia, the name of the man and the name of the town, on the top?

A. Yes.

Q. Could you buy one where that indicia was on the bottom?

A. I guess you could. I am not sure.

Q. You don't know whether your company made them or not, is that right?

A. That is right. [89]

* * *

PAUL D. HUCKELBURY

recalled as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows: [91]

* * *

Cross-Examination

By Mr. Fulwider:

Q. I am a little confused on this master die. As I understood it from the witness this morning, Mr. Lenk I believe it was, the master die is only this portion, the end portions of the frame, and had no relation to the inserts, the headers.

You say that the master die includes a complete periphery?

(Testimony of Paul D. Huckelbury.)

A. Not necessarily because—you don't know too much about tooling?

Q. That is right. [93]

* * *

Q. Referring to Exhibit C?

A. Referring to Exhibit C—you might change that to any design that you might wish.

In this particular die here, I think you will notice on the back it has "Style 458-R." We could very conceivably run a Style 450 which is like this frame right here (indicating). We could run a 450. We have in the neighborhood of 200 or 300 different styles of 2-line frames. They can be run either as single line or 2-line frames. They may have a Chevrolet emblem at the top or any various shape or size.

Q. If I understand you correctly, the master die, when you speak of outer and inner peripheries, you are speaking of this standard length so that the master die comes straight across here at the top and at the bottom, and then you can put any kind of insert at the top or bottom.

A. That is correct.

Q. So referring to this Exhibit C, when you say you have a master die that is without inserts, isn't it?

A. The master die is the die without the inserts. We do have those particular inserts, though, that go in the master die. [94]

* * *

(Testimony of Paul D. Huckelbury.)

Q. It doesn't show anything as to what kind of an insert it was. You could have a 2-inch insert or a 1-inch insert or a no-inch insert.

A. That is right. It is made expressly for 2-line frames. That is why it was cut out like that.

Q. It is made to be used with any number of inserts? A. Yes.

Q. Or with no inserts?

A. Yes. Because no tool maker would make a die and cut a pocket in the bottom if he didn't have any idea of running a 2-line frame because you have extra labor in removing these parting lines that you will notice in this casting.

Q. But it has to be a cavity such as can hold any one of any kind of an insert you want to put into it? [95] A. That is correct.

* * *

Recross-Examination

By Mr. Fulwider: [100]

* * *

Q. If I understood your testimony correctly, you can put one or more inserts in any one of these master dies, can't you, different styles?

A. That is right.

Q. Now do you have any memorandum or records or notes or anything that you use to refresh your recollection here that these various dies you speak of were there at the Benmatt Organization before you went into the Service?

* * *

(Testimony of Paul D. Huckelbury.)

The Witness: I do not have any access to any records, and never have had.

Q. (By Mr. Fulwider): You have no personal memorandum or notes or photos or anything like that that you have used to refresh your recollection?

A. No; I have no records. [101]

* * *

Q. This master die setup like you use it, though, you can use that interchangeably, can't you, to make double-header or single-header frames?

A. The die that I refer to, yes. Our latest tooling isn't made that particular way.

Q. The ones you were speaking of earlier, when you and I were talking?

A. Yes, of which those are the samples.

Mr. Young: One more question.

Redirect Examination

By Mr. Young:

Q. Before you went into the Service was it common for you to furnish license plate frames which were single lined and which might have that single line either on the top or the bottom?

A. Oh, yes. It all depends on the automobile that it was manufactured for, like in this particular year, the Plymouth won't take a top down because the frame is—may I have one of the frames?

(The exhibit referred to was passed to the witness.)

(Testimony of Paul D. Huckelbury.)

The Witness: You take this particular frame here, you don't have enough clearance on a Plymouth to put the frame this way. (Illustrating.) [110]

Q. (By Mr. Young): The frame you are referring to is Exhibit K?

A. Yes. In this particular frame, if you mount it on the bracket you don't have the clearance between the light bracket, and it has been that way for years, so we insert it.

* * *

GODFREY BELL

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows: [114]

* * *

Direct Examination

By Mr. Young:

Q. Mr. Bell, were you ever connected with the Shehan Manufacturing Company? A. Yes.

Q. During what years?

A. From around about 1926 to about—well, I am still connected with the company. I mean it still hasn't been liquidated completely.

Q. Did the company ever manufacture license plate frames? A. Yes.

Q. When did the Shehan Manufacturing Company stop manufacturing license plate frames?

A. In about 1943.

(Testimony of Godfrey Bell.)

Q. Did you sell your business to the Bennatt Organization?

A. No; we turned it over to the Aero Specialty company who, in turn, I believe, sold out to the Bennatt Organization.

Q. When did you make this sale to the Aero Specialty Company?

A. It was around in 1947, I believe, in the [112] neighborhood of that.

Q. Do you recall the type of frames that were made by the Shehan Manufacturing Company?

A. Yes.

Q. Did you make single line frames?

A. Yes.

Q. Could the single line be on either the top or the bottom? A. Yes.

Q. Did you ever make 2-line frames?

A. I believe so, yes. I am sure we did.

Q. Did you make them before you stopped manufacturing in 1943? A. Yes.

Mr. Young: That is all.

The Court: Cross-examine.

Cross-Examination

By Mr. William K. Young:

Q. Mr. Bell, you were identified with this Shehan Manufacturing Company between 1926 and for some years thereafter? A. That is right.

Q. What was the nature of this company, was it a corporation or a partnership?

(Testimony of Godfrey Bell.)

A. It was a partnership and I was one of the partners.

Q. Were you a general partner or limited partner? [113]

A. I was a general partner.

Q. How many partners were there?

A. Just two.

Q. Did you have any regular hours of employment there in the place of business from 1926 on?

A. Well, not what you would call regular. I mean I didn't have to punch a clock or anything like that. I was there every day, though.

Q. What was your identity with the company, more of a financial nature?

A. No. In fact, I managed the company.

Q. What was the general business of the company?

A. It was manufacturing automotive accessories. We did stamping and die casting, plating.

Q. With reference to the license plate frames that you manufactured, what percentage of the frames represented the other products manufactured by your company?

A. Well, it changed from time to time. In 1927 it was a very small part of our gross business. But toward 1938, '39, '40, it was a major part of our business.

Q. By "major," you would say 80 per cent or better?

A. At least, yes.

Q. Did you continue to be active at that time with the company?

A. Yes. [114]

(Testimony of Godfrey Bell.)

Q. Were you general manager then?

A. Yes.

Q. You observed the progress made in the design of license plate frames, did you, from time to time as the years passed?

A. Yes, we would naturally see that there was a lot of designs that we would sort of make ourselves, changes.

Q. Now, sir, how is it that you place with some measure of accuracy, as you seem to here, with reference to 1938, that that is the time you manufactured double header frames?

A. Well, I didn't say 1938. I was asked if we made a double line frame, and I said that we did. Now, whether it was in 1938, I can't remember exactly.

Q. Was this incident in 1938? How do you happen to recall that? Did you go into production on it?

A. Well, as I said, I didn't state the time or, in other words, give any date that we started to make the 2-line die. I said that we made it. I was asked if we had made it, and I said yes, but I put no date on it at all.

Q. Does your memory serve you as to when you did make it?

A. No; I couldn't tell you just exactly when it was, whether it was in 1937, '38 or '39.

Q. Or whether it was possibly later?

A. Well, no, I don't think it was later, very much [115] later.

(Testimony of Godfrey Bell.)

Q. Are you relying solely on your memory to relate the facts you just have?

A. That is right.

Q. Have you had any opportunity to refer to any documents that would refresh your memory in any fashion?

A. No, I haven't. I have no records available at all. All my records of that were all destroyed.

Q. What is there in your memory that refers you to these years to the exclusion of other years?

A. Because we discontinued all manufacturing in '43, approximately '42 or '43, and I feel sure it was at least about three or four years before that.

Q. Do you recall that because you saw it personally?

A. Yes.

Q. And you recall the one that you made was an experimental model?

A. No, no. We sold them. They were in production.

Q. In 1937, '38 or '39?

A. Somewhere in that neighborhood.

Q. Were they sold locally or elsewhere?

A. I would say locally up and down the Pacific Coast.

Q. Does your memory serve you that that is so?

A. In other words, wherever our sales organization went at that time, why, they were sold. [116]

Q. Would you say that 80 per cent of your production at that time represented these double header frames?

(Testimony of Godfrey Bell.)

A. No; I didn't say that at all. I said that license frames was about 80 per cent of our total business.

Q. What would be your present estimate as to the percentage of double headed frames?

A. I would not be able to give you that information at all.

Q. Is it possible that you could have been mistaken as to the years in the 30's than it might have been in the 40's?

A. No, I don't think so.

Q. Do you recall on which side, the top or the bottom, this double-header insert was present?

A. They were on both top and bottom. In other words, there was reading matter on the top and bottom. In other words, what would be an insert at the top and an insert at the bottom of the frame. [117]

* * *

Redirect Examination

By Mr. Young: [119]

* * *

Q. And the last frame before you?

A. That is Exhibit D. Yes, we made a frame similar to this. Whether this is the one, I don't know, but we made a [120] master die just for this particular frame. In fact, this looks like this was the frame we made. This was made for Dura Products Company. They were our distributors back East. [121]

* * *

ROBERT SORENSON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Young:

Q. Mr. Sorenson, you are here by subpoena, are you not? A. Yes, sir.

Q. Did you produce any documents that the subpoena asked you to bring in? A. Yes, sir.

Q. May I have them?

A. (Producing documents.)

Q. (By Mr. Young): While counsel is examining the papers you brought [122] in, I will hand you Exhibit D. I ask you if you know who made that frame?

Mr. William K. Young: Your Honor, as long as we are engaged in examination, I think he should suspend until we get through.

Mr. John Young: Very well. I am sorry.

I ask that these papers be marked for identification.

The Court: As one exhibit?

Mr. Young: Yes, with the letter followed by numbers indicating which is which.

The Clerk: Exhibits O-1 to O-4.

(The exhibits referred to were marked Defendants' Exhibits O-1 to O-4, inclusive, respectively, for identification.)

(Testimony of Robert Sorenson.)

Mr. Young: Exhibit O-1 is a statement dated October 1 of the Angelus Die Casting Company.

Mr. Fulwider: What year?

Mr. Young: 1947.

Exhibit O-2 is an invoice, No. 704, dated September 26, 1947.

Exhibit O-3 is a second statement, dated September 19, 1947.

Exhibit O-4 is a second invoice, dated September 19, 1947.

The Court: Very well.

Q. (By Mr. Young). Can you identify these four papers which I hand you, [123] Exhibits O-1, -2, -3 and -4? A. Yes, sir.

Q. Where did they come from?

A. From the files at my shop.

Q. And what is the name of your shop?

A. Angelus Die Casting Company.

Q. How long have you been associated with the Angelus Die Casting Company?

A. Since 1946.

Q. I previously called your attention to Exhibit D. Is there any connection between Exhibit D and these invoices and statements? A. Yes, sir.

Q. Will you tell us what that connection is?

A. We made a casting similar other than it wasn't for this particular size, for the Benmatt Organization.

Q. And that is shown on what exhibit?

A. D.

(Testimony of Robert Sorenson.)

Q. Is it also shown on any of the papers in your hand? A. Yes.

Q. Which one?

A. On the statement O-1, O-2, the invoice, O-3, the statement and O-4, the invoice.

Q. What do those statements and invoices show?

A. That we made the castings for this Benmatt Organization [124] on these dates.

Q. Were the castings similar to that in Exhibit D?

A. Exactly the same other than these are a little bit longer. The ones that we made were for Nevada and the other one I assume is California.

The Court: Hold up Exhibit D.

The Witness: (Exhibiting.)

The Court: That is the Shell frame?

The Witness: Yes.

The Court: You made them for Nevada?

The Witness: Nevada and I assume the other one——

The Court: They have different sizes for different states?

The Witness: Yes, sir.

The Court: You made the castings, you did not make the die?

The Witness: No, sir; we made the parts. And also for California.

Q. (By Mr. Young): Do you know of any 2-line frames that were made before you made those castings, Exhibit D?

(Testimony of Robert Sorenson.)

A. Do I know of any 2-line frames? I wasn't in the frame business, I was in the die casting business when I made these castings.

Q. So your answer is no? [125]

A. Yes, sir. [126]

* * *

Mr. Young: This, your Honor, is the deposition of Stanley M. Olson, taken on behalf of the defendants in the above-entitled case, before James A. Werner, Notary Public of Hennepin County, Minnesota, on the 19th day of January, 1956, commencing at approximately 10:00 o'clock in the forenoon, at 950 Pillsbury Building, Minneapolis 2, Minnesota, pursuant to notice.

Appearances: Lyon & Lyon, Attorneys at Law, 811 West Seventh Street, Los Angeles 17, California, and Williamson, Schroeder, Adams & Meyers, Attorneys at Law, 950 Pillsbury Building, Minneapolis, Minnesota, by John W. Adams and H. Dale Palmatier, 950 Pillsbury Building, Minneapolis, Minnesota, appeared for and on behalf of the defendants.

Fulwider, Mattingly & Huntley, Attorneys at Law, 5225 Wilshire Boulevard, Los Angeles, California, and Paul, Moore & Dugger, Attorneys at Law, Midland Bank Building, Minneapolis, Minnesota, by Robert P. White, Midland Bank Building, Minneapolis, Minnesota, appeared for and on behalf of the plaintiff.

DEPOSITION OF STANLEY M. OLSON

“Whereupon,

“STANLEY M. OLSON

of lawful age, being called, sworn and examined as a witness, deposeth and saith:

“By Mr. Adams:

“Q. Mr. Olson, will you state your home [127] address, please?

“A. 4728-17th Avenue South, Minneapolis.

“Q. You previously gave your full name as Stanley M. Olson, O-l-s-o-n? A. Right.

“Q. Where do you work, Mr. Olson?

“A. The Douglas Company.

“Q. What is the address of the Douglas Company? A. 620-12th Avenue South.

“Q. And what is your position presently with the Douglas Company?

“A. Vice President in charge of sales.

“Q. And how long have you been employed by the Douglas Company? Since what date?

“A. November 17, 1947.

“Q. What was your position when originally employed?

“A. I was employed as sales manager.

“Q. What business is the Douglas Company engaged in?

“A. We manufacture, in a broad sense, advertising specialties.

“Mr. Adams: Excuse me just a second.

“(Discussion off the record.) [128]

(Deposition of Stanley M. Olson.)

“Mr. White: May I have that last question and answer again, please?

“(The last question and answer were read by the reporter.)

“Q. (By Mr. Adams, continuing): What specific items do you manufacture in the nature of automobile accessories or advertising material?

“A. We make emblems of Scotchlite, Krome Kal, metal emblems and license frames.

“Q. Has the Douglas Company manufactured and sold license frames since you began working for them?

“A. We were tooling for our first frame when I came with the company on November 17, 1947. Then we made our first sales in December, 1947.

“Q. Had you prior to tooling up for this frame made frames of any other type for licenses?

“A. No, we had not.

“Mr. Adams: I think this should be marked Defendants' Minneapolis Deposition Exhibit 1 in order to identify properly. Would you so mark it, please?”

The Court: And it was marked and it is now Exhibit A-1.

The Clerk: Yes, your Honor.

“Q. (By Mr. Adams, continuing): Mr. Olson, I think that is the exact one that was [129] photostated.

“Q. (By Mr. Adams, continuing): Mr. Olson,

(Deposition of Stanley M. Olson.)

I hand you Defendants' Deposition Exhibit 1 and ask you to identify that, if you will, please?

"A. Well, this is the type of mailing piece that we generally prepare which also serves as a salesman's catalog sheet.

"Q. The pictures shown in that piece exemplify the frames which your company sold since starting in the frame business? Is that right?

"A. Yes.

"Q. The license frame business? A. Yes.

"Mr. Adams: Mark these, please."

The Court: And they are now Exhibits A-2, A-3 and A-4. They follow the same number except with the letter "A" in front of them.

"Q. (By Mr. Adams, continuing): Mr. Olson, I hand you Defendants' Exhibit No. 2 and ask you to identify that, if you will, please?

"A. Well, this is a sales order copy which is made up from the original salesman's order.

"Q. I will ask you to identify Exhibit 3.

"A. This Exhibit 3 is a copy of the original order from which the sales order was typed.

"Q. From whom was this order taken? Who was [130] the customer?

"A. The customer was Kobb Motor Sales, Incorporated, Saint Paul.

"Q. Would you indicate the address, please?

"A. 654 University Avenue.

"Q. Toward the bottom of both Exhibits 2 and 3 the words 'Kobb Motor Sales' and 'Saint Paul' ap-

(Deposition of Stanley M. Olson.)

pear. Would you explain the purpose of that copy material on both of the exhibits, please?"

Mr. Fulwider: That question I want to object to because there is no foundation laid as yet as to whether or not this gentleman knows anything as to what these various documents purport to show.

The Court: Technically you are correct, there is none yet shown in the deposition, but, as I said, I have read the deposition all the way through and it develops that he is the general sales manager and he testified about these records here being kept under his supervision, so your objection is overruled.

"A. Well, that is to indicate to us the way the customer and the salesman wanted the copy placed on the frame.

"Q. The copy being the printed material, advertising material on the frame? Is that correct?

"A. Yes. [131]

"Q. Would you, from Exhibits 2 and 3, identify the manner in which that copy was to be placed on the frame? You can refer to Exhibit 1, if you wish.

"A. Well, the company name was to be placed on the top part of the frame and the city name on the bottom section of the frame.

"Q. Is the next-to-the-bottom picture in Exhibit 1 an exact copy of the frame as it was actually furnished to Kobb Motor Sales?

"A. Yes, that is an exact copy.

"Q. And was Kobb Motor Sales the first or one of the first customers who bought these license plate

(Deposition of Stanley M. Olson.)

frames from you? A. Yes, they were.

“Q. Would you state the date indicated on Exhibit 3, please?

“A. This date is December 26, 1947.

“Q. And what does the date indicate?

“A. That is the date that the order was written—taken from the customer.”

Mr. Fulwider: We object.

If your Honor please, I want to make this thing as short as I can. On the other hand, it seems to me, how could this gentleman testify as to what the date on this so-called order blank means? There is no testimony as to whether he took it [132] or that it was the usual practice of the company to take orders on this kind of a book.

The Court: He is the general sales manager and vice president, and he has not testified that he knows how an invoice is made out but do you not think that the court is required to indulge the presumption that this man knows something about what the records mean in his business if he is sales manager?

Mr. Fulwider: I would think he should but nowhere could I find in here that he ever did say so.

The Court: I do not think he did.

However, he testifies at length further here about others of these exhibits and the serial number, because there appears to be a conflict between the date that the order was signed on this Kobb Motor Sales and the date of this invoice.

The objection is overruled.

(Deposition of Stanley M. Olson.)

Mr. Fulwider: Maybe we can shorten it.

May we be considered to object and renew our objection to each one of these as they go along?

The Court: Yes. It may be stipulated that the same objection is made to each one of the questions asked in this deposition of this witness concerning the business records.

Mr. Fulwider: Yes, your Honor.

The Court: As no foundation having been laid.

Mr. Fulwider: That is my point. [133]

The Court: Objection overruled.

“Q. Does the customer’s signature authorizing the order appear on that sheet?

“A. Yes. There is a signature on the bottom.”

Mr. Fulwider: We move to strike that. There is no foundation that he knows who signed it. I mean, that is a little bit more than my continuing objection to business records.

The Court: The portion of the answer will be stricken, after the word “Yes,” because there is a signature on the bottom. That will remain.

“Q. Would you indicate the sales order number and the date on which that order was processed in your office from Exhibit 2, please?

“A. The sales order number is 2606 and the date processed was December 30, 1947.

“Q. I hand you Exhibit 4. Will you identify that, please?

“A. Well, this is an office record where we keep track of all customer orders placed with us; that

(Deposition of Stanley M. Olson.)

is, all orders placed with us for this particular customer.

“Q. Regardless of what the material might be?

“A. Yes.

“Q. Whether it is license plate frames—— [134]

“A. That is right.

“Q. Or any purchase by a customer is listed on that particular card? A. That is right.

“Q. Will you please reiterate in your own words what information is indicated on this so-called customer card, Exhibit 4, please?

“A. This customer card lists all items that that particular customer may have purchased from us regardless of what the item might be.

“Q. Will you refer to item two on Exhibit 4, please?

“A. Item two is ‘250 Douglas Frames at 78 cents each; sales order No. 2606.’

“Q. And the date indicated on that?

“A. December 26, 1947.

“Q. What does that date indicate?

“A. That indicates the date which they placed an order with us for this product.

“Q. The date of placing the order?

“A. That is right.

“Q. Is there any indication of the copy material on those frames?

“A. Yes. This particular instance gives ‘Kobb Motor Sales, Saint Paul.’ [135]

“Q. What would that mean to someone in your company? What would that mean to you if you

(Deposition of Stanley M. Olson.)

were to interpret that as to the position of the copy on the frame?

“A. Well, that in itself would not be conclusive just as it is stated there. I might say that it is not always the copy as you see—it is not always shown but because this was a new item the girls put that on.

“Q. Is the sales order 2606 the same order as exemplified by Exhibit 2? A. Yes, it is.

“(Defendants’ Minneapolis Deposition, Exhibit 5, was marked for identification.)

“Q. Do you have any frames exemplified on Exhibit 1 as being your number 101 AA at the present time? A. No, we do not.

“Q. I show you defendants’ Exhibit 5 and ask you to identify that, if you will, please?

“A. Well, this is a license frame which we now call No. 104, which has copy on the top and the bottom.

“Q. Is the lettering on this frame generally similar to the lettering that appeared on the [136] Kobb Motor Sales frame?

“A. What do you mean by lettering?”

Mr. Fulwider: May I interpose?

I should make this objection by way of almost a continuing objection, that all of these questions are objectionable as leading. I realize that you can lead your witness on informal things, but I would like to get that objection in the record.

The Court: They are leading but——

(Deposition of Stanley M. Olson.)

Mr. Fulwider: It runs all the way through.

The Court: —it runs all the way through the deposition, but I do not think the deposition should be thrown out for that purpose. It is a vice in which every lawyer participates.

Mr. John Young: Your Honor, I think that the objection that the question is leading is waived unless it is expressly objected to on that ground at that time. All other objections are reserved. I think the form of the question, unless objected to, is waived.

The Court: There are a number of objections in here, but this objection is overruled anyhow.

“A. What do you mean by lettering?

“Q. The copy work.

“A. Yes. The copy work is similar to what Kobb Motor Sales had. [137]

“Q. Is the general construction of the frame similar to the frame 101 AA?

“A. Exactly the same as far as construction is concerned.

“Q. The only difference is being in the appearance of the upper portion, the upper cross bar of the frame? Is that right? A. Yes.

“Mr. White: If I may, will you please read Mr. Adams' last comment here?

“(The question was read by the reporter.)

“Mr. Adams: I will ask the reporter to mark this as Exhibit 6, please?

(Deposition of Stanley M. Olson.)

“(Defendants’ Minneapolis Deposition, Exhibit 6, was marked for identification.)

“Q. (By Mr. Adams, continuing): I hand you Defendants’ Exhibit 6 and ask you to identify that by number, please, and date.

“A. This is another sales order, No. 2550, and it is dated 12-19-47.

“Q. Now, the actual sale there is immaterial. My next question is, as to the series of your sales order numbers, have they been consecutively numbered through this period of way December 1st through February 28th in 1947 and ’48? [138]

“A. Yes. These are just sales order numbers that we take as they are typed and order them in consecutive numbers. In other words, they are just taken off a pile of forms.

“Q. In other words, as the dates and numbers indicate, this order was in the same series as Order 2606 and was written up in December of 1947?

“A. Yes.

“(Defendants’ Minneapolis Deposition, Exhibits 7 and 8, were marked for identification.)

“Q. I hand you Exhibit 7 and ask you to identify that, if you will, please?

“A. This is another sales order, No. 2757. The order date is January 16th with the date of the sales order being January 20th.

“Q. What year?

“A. 1948; made out for Lambin Motors.

(Deposition of Stanley M. Olson.)

“Q. Lambin—L-a-m-b-i-n?

“A. Yes, Lambin Motors, Incorporated, 3006 West 50th Street, Minneapolis.

“Q. Has the ownership or the name of that customer been changed since the date of that order?

“A. Yes. This company is now known as the Edina Motors.

“Q. I hand you Exhibit 8 and ask you to [139] identify that, please?

“A. We have here the customer card similar to that described previously for Kobb Motors which gives and lists all of the items that this customer, including his successor, has purchased from us.

“Q. I note that the name of the customer has been changed on the top. Would you explain that quickly, please?

“A. We do that just changing the customer name on the original customer card because it does indicate what that customer has previously purchased.

“Q. Rather than make out a new card?

“A. Yes.

“Q. I refer to the third item on the customer card. Would you identify that, please?

“A. It is listed as ‘250 Britelite frames; sales order 2757; dated January 16, 1948.’

“Q. That is the same sales order as exemplified in Exhibit 7? Is that correct? A. Yes.

“Q. I refer to Exhibit 7 and ask you to identify the copy indication on Exhibit 7, if you will, please?

“A. This list is ‘Top line, Lambin Motors, Inc.;

(Deposition of Stanley M. Olson.)

bottom line, Minneapolis,' and then below [140] that it says, 'Similar to Kobb layout.'

"Q. Now, I refer to the price list indicated in Exhibit 1. Would you identify from that price list the particular item number that is listed thereon with respect to the Lambin Motors sales order?"

Mr. Fulwider: Your Honor, I think a further objection should be made there. There has been no date yet established for this Exhibit 1, and how he can testify that a particular sale refers to a particular price list, there is absolutely no foundation for that question or any tie-in of the exhibit, such as these cards, Exhibit No. 1.

The Court: There is no date in the deposition given for the coming into existence of Exhibit No. 1.

Mr. John Young: I believe that is correct.

The Court: I will sustain the objection to the question on page 12, line 3, and on page 12, line 9 down to line 16.

"Q. (By Mr. Adams, continuing): Would you state briefly how the copy is put on? For example, the merely embossed frames?

"A. You mean the procedure by which this is applied; the manufacturing process?

"Q. Is it a printing operation? Is it a silk screen—how do they work it?

"A. Well, all of these frames are a silk [141] screen process.

"Q. All right. Now, distinguish between the Britelite, which costs, I see, just a little bit more than the embossed, and the embossed?

(Deposition of Stanley M. Olson.)

“A. Well, a Britelite frame is processed twice: First, the background color, and then the copy, and it is dipped in beads to make it reflect at night. An embossed copy is processed once and the letters are raised by a die, in the embossing process.

“Q. There is no reflectorized material on the embossed? A. No.

“Q. And the purpose of the glass beads is to reflect at night on the Britelite? A. Yes.

“Q. Against the name? A. Yes.

“Mr. Adams: Would you mark that as Exhibit 9?

“(Defendants’ Minneapolis Deposition, Exhibit 9, was marked for identification.)

“Q. (By Mr. Adams, continuing): I hand you Defendants’ Exhibit 9 and ask you to identify that, if you will, please?

“A. This is another sales order, No. 2792, [142] dated January 21st for Dependable Motors, Incorporated, 600 South Seventh Street, Minneapolis. It calls for 500-102 license frames, Britelite.

“Mr. Adams: Would you mark this, please?

“(Defendants’ Minneapolis Deposition, Exhibit 10, was marked for identification.)

“Q. (By Mr. Adams, continuing): I will ask you to identify Defendants’ Exhibit 10, if you will, please? A. This is a 102.

“Q. License frame?

“A. Yes, license frame, bottom mount, as we call it.

(Deposition of Stanley M. Olson.)

“Q. Bottom mount, meaning what?

“A. That the large copy is at the bottom.

“Q. Referring back to Exhibit 9, I believe you left off the year when you mentioned the date.

“A. 1948.

“Q. Would you state the whole date, please, again? A. January 23, 1948.

“Q. And then there is another date on there. What does that refer to?

“A. That's the date of the order.

“Q. And in similar manner the processing of the [143] order——

“A. Yes, January 21st is the date.

“Q. The order was taken January 21, 1948, and the order was written up in your office on January 23, 1948? A. That is correct.

“Q. I notice in the picture shown at the top in Exhibit 1 that the Dependable Motors' frame is indicated there; that is indicated as the top mount?

Is that correct? Was that probably the way that was sold?

“A. The picture shown is exactly the way Dependable Motors purchased their frame.

“Q. As exemplified by sales order 2792?

“A. Yes.

“Mr. Adams: Would you mark these, please?

“(Defendants' Minneapolis Deposition, Exhibits 11 and 12, were marked for identification.)

“Q. (By Mr. Adams, continuing): I hand you

(Deposition of Stanley M. Olson.)

Defendants' Exhibit 11 and ask you to identify that by sales order number, date of order, date that the order was written and the customer?

"A. This is sales order No. 2986. It was typed up on February 6, 1948. It was taken on January 29, 1948. It is for Malmon Pontiac, Incorporated, 235 [144] West 9th Street in Saint Paul and it calls for 500 No. 102 frames, Britelite.

"Q. And the price?

"A. The price is 500 at 85 cents each.

"Q. And referring to the price list on Exhibit 1, would you identify that, please?

"A. This is No. 102, Britelite frames, 85 cents each in 500 lots.

"Q. Down toward the lower left-hand corner of Exhibit 11 is an indication of Malmon, Saint Paul, with some other indicating material. What is that, please?

"A. The top line of the copy was to be an Indian head on each end with the word 'Malmon' in the center.

"Q. You don't mean the top line necessarily?"

Mr. Fulwider: We will object to that as leading.

The Court: Objection sustained.

"Q. (By Mr. Adams, continuing): You go ahead and identify it.

"A. The copy is in the large section of the frame——

"Q. I see.

"A. And then on the narrow section is the city name, Saint Paul. [145]

(Deposition of Stanley M. Olson.)

“Q. In other words, referring to Exhibit 10, which is your 102 frame, and inverting it we would get a picture of the Malmon order?

“A. That is right.

“Q. And instead of the word ‘Chevrolet,’ as is shown on Exhibit 10, there would be two Indian heads? A. Yes, Pontiac emblems.

“Q. With the word ‘Malmon’ in between?

“A. That is right.

“Q. And on the bottom cross bar of the frame is the word ‘Saint Paul’? A. That is right.

“Q. Is this the same layout as indicated on Exhibit 12?

“A. This is the copy of the original order from which the original sales order 2986 was written.

“Q. And the copy on the order is written out and signed by the customer? Is that correct?

“A. Yes. This is signed by Malmon Pontiac.

“Mr. Palmatier: Referring to Exhibit 12?

“Mr. Adams: Referring to Exhibit 12.

“(Defendants’ Minneapolis Deposition, Exhibit 13, was marked for identification.)

“Q. (By Mr. Adams, continuing): I hand [146] you Defendants’ Exhibit 13 and ask you to identify that in the same manner as you have in the previous invoices.

“A. This is sales order No. 3032, dated February 13, 1948, which was taken as an order on February 7, 1948. It is for the Downtown Ford Company, 9th

(Deposition of Stanley M. Olson.)

at Auditorium, Saint Paul. It calls for 500 No. 102 Britelite frames at 85 cents each.

“Q. The copy material indication on the sales order?

“A. The copy indicates ‘Downtown’ with a large ‘Ford’ cut in the center, ‘Company,’ being the top section of the frame, with the words ‘Saint Paul’ for the narrow section of the frame.

“Q. At the bottom? A. At the bottom.

“Q. In other words, the word ‘Ford’ would be embossed similar to the word ‘Ulmer’ on the 102 frame? A. Not embossed.

“Q. Not embossed?

“A. This happened to be Britelite.

“Q. Oh, I see. That is right. I refer to Exhibit 10 as being the 102 frame and that would be—the Downtown Ford frame was sold in the [147] upright position or top mount position?

“A. Yes.

“(Defendants’ Minneapolis Deposition, Exhibit 14, was marked for identification.)

“Q. I hand you Exhibit 14 and ask you to identify that, if you will, please?

“A. This is a customer card for Motor Sales, Incorporated, 1300 Hennepin Avenue, Minneapolis.

“Q. Then will you refer to item 3 on Exhibit 14?

“A. Item 3 refers to Douglas Frames, dated 1-16-1948. Now, I notice it calls for 500 frames and that has been marked out and changed to 100. It

(Deposition of Stanley M. Olson.)

calls for 500 Kobb, in parentheses, Douglas Frames and that has been scratched out in red and 100 No. 101 has been placed in there. I don't know why the change was made. They are the same frame but they were changed in quantity.

“Q. When you say they are the ‘same frame,’ what do you mean?

“A. A Kobb frame is the same as a 101 frame, as we previously stated.

“Q. I see. What would the word ‘Kobb’ indicate with respect to the copy in all probability?

“A. Well, that would refer to the fact that copy was placed on the top and bottom. [148]

“(Defendants’ Minneapolis Deposition, Exhibit 15, was marked for identification.)

“Q. I hand you Defendants’ Exhibit 15 and ask you to identify that.

“A. This is a 102 top mount Britelite frame.

“Q. I notice that that is a little different size than the 102 bottom mount frame that we referred to as Exhibit 10. Would you explain that, if you will, please?

“A. Well, the various states have different sized license plates and we had to make changes in our dies to get the various states.

“Q. Do you have different end dies perhaps for the narrower plates or is it just a single die? In other words, do you have different sets of die shoes? Explain that a little bit—the manufacture of it.

“A. Well, this frame is made with many parts.

(Deposition of Stanley M. Olson.)

“Q. That is, the die?

“A. The die, rather, and, therefore, we can remove certain parts of the die so that it will better fit in the various states. That is why we made it and designed the frame that way. We keep the header area the same because then our art work and screening can be kept uniform. [149]

“Q. The header area being the area to which the copy is applied? A. That is right.

“Q. I notice that you have a lot of different styles and arrangements shown in Exhibit 1 and in Exhibits 5, 10 and 15. What governs the arrangement that is made up?

“A. Well, there are probably two main factors: One is the preference of the customer and the other is the fit on the car. In some cases the car will not take, for example, a top mount frame and, therefore, you must take a bottom mount frame. Some customers prefer having the city name and their company name all in one place; others prefer having it split such as having copy in both areas. So, with this arrangement we are able to satisfy both of those needs: The customer's preference and the fit of the car.

“Q. From that information then it would appear that it is merely a matter of expediency or choice as to where the copy is placed and how the frame is to be mounted? A. That is right.

“Mr. Adams: I think that is all that I have. Can you think of anything that might help? [150]

“Mr. Palmatier: No, not particularly.

(Deposition of Stanley M. Olson.)

“Mr. Adams: Okay. I think I will ask just a couple of questions more, Bob, excuse me. I just thought of something.

“Q. (By Mr. Adams, continuing): Would you state, to the best of your recollection, how long after the orders were typed up that shipments were made on these early sales of your license frames?

“A. Certainly, it would not be sooner than about a week or week and a half and not longer than three weeks. Particularly in this case, these were new products so we were geared to get the items out quickly so we would have samples and actual orders on cars on the street to show.

“Q. Were your die sections all made up prior to taking orders in this case?

“A. The dies were completely made and we had actual stampings before we went to sell.

“Q. You say you had ‘actual stampings.’ What do you mean by that?

“A. Actual frames; blanks.

“Q. You made up frames before you called on the customers?

“A. Yes. They actually saw what they were getting. [151]

“Q. That has the customer’s possible copy on it, too?

“A. Well, we did make—I know for sure that we made Motor Sales and Dependable Motors. We actually made up samples to show them before they ordered. Kobb Motors, I do not remember. We had

(Deposition of Stanley M. Olson.)

to have a name on the frame and we took, naturally, local customers to whom we could show the frames. So in those cases, of course, we were all set to go. It was just a matter of going out in the factory and running them.

“Q. In other words, the Dependable Motor Sales identified by Exhibit 9, sales order 2792—there definitely was a sample made up and shown before that order was taken? A. Yes.

“Q. And similarly to the Motor Sales order of January 16, 1948, identified on the customer card for Motor Sales? A. Yes.

“Mr. Adams: That is all.

“Mr. Palmatier: All these were available when they first started selling?

“Q. (By Mr. Adams, continuing): Did I understand you to previously testify that all of the models [152] shown (indicating) in Exhibit 1 were available to your customers when you first introduced this frame onto the market?

“A. Oh, yes.

“Q. Or shortly thereafter?

“A. Yes. They were available from the start. That was the idea in planning.

“Mr. Adams: All right. That is all.

“Cross-Examination

“By Mr. White:

“Q. Mr. Olson, you will recall that in December of 1952 you received a letter addressed to your at-

(Deposition of Stanley M. Olson.)

tention at the Douglas Company from R. W. Fulwider?"

The Court: There is an objection here. Do you now object?

Mr. John Young: Yes, I do object to that as being beyond the scope of the direct. I do not now object to this; I don't think it makes any difference whether it goes beyond the scope of the direct or not.

The Court: All right. Go ahead.

"Q. (By Mr. White, continuing): This letter was from Mr. R. W. Fulwider, Attorney for U. S. License Frame Manufacturing Company advising you of [153] infringement of Bessolo Patent D 167,878—the patent in suit?

"A. What are you asking me to remember now? I certainly would not remember any number.

"Q. You did receive a letter from Mr. Fulwider in December of 1952 charging the Douglas Company with patent infringement of a design patent?"

Mr. Young: Your Honor, shall I continue with the colloquy or omit the colloquy?

The Court: No, skip the colloquy.

"Q. (By Mr. White, continuing): Mr. Olson, in December, 1952, there was a letter addressed to the Douglas Company to your attention from Mr. Fulwider, Attorney for U. S. License Frame Manufacturing Company, charging the Douglas Company with infringement of the Bessolo design patent, was there not?

(Deposition of Stanley M. Olson.)

“Mr. White: Let the record indicate a pause.

“(Pause.)

“A. Well, I believe there was a letter received. However, any letters——

“Q. (By Mr. White, continuing): That’s all I am asking for.

“A. All right. A letter was received——

“Q. I am sorry, sir. Just answer the question, if you will, and if you want to make further [154] explanation of it, Mr. Adams will do it on redirect examination. A. All right.

“Q. There was a letter received by the Douglas Company, as I understand it. It was addressed to your attention? A. That I do not know.

“Q. You don’t recall that? A. No.

“Q. It did charge patent infringement of a design patent, although you don’t recall the particular design patent number? A. Yes.

“Q. (By Mr. White, continuing): Now, you knew that it came from Mr. Fulwider of U. S. License?

“A. No. I don’t know that; I don’t recall that.

“Q. You don’t recall who it came from?

“A. No.

“Q. This letter caused you and the Douglas Company concern to the extent that you turned the letter over to your attorney, Mr. Adams, of Williamson, Schroeder and Adams, for starting an investigation, did you not?

“A. That is not under my jurisdiction.

(Deposition of Stanley M. Olson.)

“Mr. Adams: Same objection. [155]

“Q. (By Mr. White, continuing): I don't think that is an answer to my question. May I repeat the question: The patent and the letter did cause you and the Douglas Company concern in that you did turn the letter over to your attorney, Mr. Adams, of Williamson, Williamson, Schroder and Adams, to start an investigation?

“A. I repeat that is not under my jurisdiction.

“Q. Did you or did you not——

“A. I did not. I have no jurisdiction over that whatsoever.

“Q. I am not inquiring as to your jurisdiction. I am asking you to——

“Mr. Adams: The witness has answered the question. He did not.

“Q. (By Mr. White, continuing): I am asking you if the patent and the letter caused you and the company enough concern so that you or someone under your direction turned the letter over to your attorney? A. No one under my direction.

“Q. No one under your direction turned it over to your attorney. You admit receipt of this letter. What happened to it after you received it?

“Mr. Adams: Same objection as before.” [156]

The Court: Are you objecting?

Mr. John Young: No, I am not.

The Court: If you are, it is overruled.

“A. That letter—any letter of that nature that might come in would be turned over to our general manager.

(Deposition of Stanley M. Olson.)

“Q. (By Mr. White, continuing): Did you turn this letter over to your general manager?

“A. I gather that I must have then, if I don’t recall. I didn’t have any action in it.

“Q. Now, you say ‘of that nature.’ By ‘of that nature,’ you mean any letter of any seriousness as to the effect, as to the extent of charging the Douglas Company with patent infringement?

“A. Any matter outside of the realm of my job as sales manager.

“Q. I take it that you answered my question as ‘yes,’ then?

“A. I don’t know. Read the question.

“Mr. White: Would you read the second to the last question again, please?

“(The second to the last question was read by the reporter.)

“A. Certainly you wouldn’t imply that every letter that came in——

“Q. (By Mr. White, continuing): Just answer the [157] question. Either you did or didn’t. If you desire to explain——

“A. Ask your question and I will give you a direct answer.

“Mr. White: Will you read the same question again, please?

“(The same question was again read by the reporter.)

“Mr. Adams: That has about four questions.

(Deposition of Stanley M. Olson.)

Will you ask one question at a time, please?

“Q. (By Mr. White, continuing): To put it very simply, if you receive a letter notifying you of patent infringement, that is a serious letter, is it not? A. Yes.

“Q. Such a letter would be, as I understand it from your testimony, then turned over to your general manager by you as a matter of course?

“A. Any letter received from an attorney would be turned over to the general manager regardless of what is its content because I have no jurisdiction over that whatsoever.

“Q. And this letter was so turned over?

“A. That is right.

“Q. Now, just to refresh your recollection [158] a little bit more, Mr. Olson, I will show you a photostatic copy of a letter written by Mr. Fulwider.

“(Counsel hands document to the witness.)

“Mr. Palmatier: Is that an exhibit?

“Mr. White: Pardon?

“Mr. Palmatier: Is that an exhibit?

“Mr. White: Not yet.

“Q. (By Mr. White, continuing): Have you read it? A. Yes.

“Q. It is addressed to you? A. Yes.

“Q. Rather I should say, it is addressed to the Douglas Company directed to your attention?

“A. Yes.

“Q. Now, as a result of refreshing your recollection from this paper—may I have it, please?

(Deposition of Stanley M. Olson.)

“A. Yes.

“Q. Does this paper refresh your recollection as to this particular letter?

“A. Yes. I see the letter.

“Q. So that in December from the date of this letter, December 20, 1952—at least some time in December within several days after December [159] 20th, you received this notice from Mr. Fulwider relative to the patent infringement?

“A. I gather with this that I did.

“Q. But you have no recollection of taking any action with reference to this letter yourself?

“A. No.

“Q. Now, I would like to hand you a photostatic copy of a letter on the letterhead of the Douglas Company, dated January 11, 1956, and written over your signature.

“Mr. White: Incidentally, I would like to ask Mr. Adams if he will stipulate that that is a true and correct copy of the letterhead and letter?

“(Brief pause.)

“Mr. Adams: It appears to be a copy of your letter.

“The Witness: Yes.

“Mr. White: As I understand it, it may be so stipulated?

“Mr. Adams: It appears to be a copy of the letter that was apparently sent by Mr. Olson to the firm of Lyon & Lyon.

(Deposition of Stanley M. Olson.)

“Mr. White: On the letterhead of the Douglas Company?

“Mr. Adams: That is right. [160]

“Q. (By Mr. White, continuing): Now, you have looked at it, Mr. Olson? A. Yes.

“Q. The letter was written at your direction?

“A. Yes.

“Q. Over your signature?

“A. You mean I dictated the letter?

“Q. Well, if you did dictate it then it was written at your direction? A. Yes.

“Q. And over your signature? A. Yes.

“Q. Now, I would like to ask you to look at this letter, the first paragraph, third sentence, beginning with ‘on our letterhead’ and ending ‘1932.’ Would you read that sentence aloud, please?

“A. ‘On our letterhead you will notice that we have a statement about serving auto dealers well since 1932. This is the only’——

“Q. I’m sorry. That is as far as I wanted you to go. A. All right.

“Q. Is that one statement starting with ‘on our letterhead’ and ending ‘1932,’ is that a correct statement? [161] A. Yes.

“Q. Now will you take that copy of the letterhead and will you point out to me the words ‘auto dealers’ on that letterhead?

“A. Since 1932? You mean about the whole——

“Q. I’m sorry. Just be responsive, if you will, to the question. Will you point out to me the words

(Deposition of Stanley M. Olson.)

on the letterhead 'auto dealers'? Is it anywhere on there?

"A. No, it isn't on here.

"Q. All right. Thank you. Will you point out to me on the letterhead the word 'serving'?

"A. No, it isn't there.

"Q. Will you point out to me on the letterhead the word 'well'? A. No, it isn't there.

"Q. Thank you. Now, Mr. Olson, you are vice president in charge of sales as I understand it?

"A. Right.

"Q. And since you came with the company as then either sales manager or vice president in charge of sales—— A. Yes.

"Q. You progressed from one responsible position to another more responsible position? [162]

"A. In title.

"Q. Well, in title at least and certainly the sales manager and the vice president share a great amount of the responsibility for the success or failure of an organization depending on sales.

"A. Thank you.

"Q. You would agree with that statement?

"A. Yes.

"Q. Now I hand you the card identified as Exhibit No. 14 and ask you if you will look at it. There are a list of items occupying the front and the back of the card, are there not? A. Yes.

"Q. A number of them being of various characters such as, for example, one item here says 'No. 34 R Key Cases.' A. Yes.

(Deposition of Stanley M. Olson.)

“Q. I presume they are key cases?

“A. Yes.

“Q. And some of the items start back in 1946 which is before your time and extend through until 1955? A. Yes.

“Q. Now referring you to the card identified as Exhibit No. 8 again there is a list of items [163] going as far back as May, 1947, which again would be before your time? A. Yes.

“Q. Now on there I note in May, 1947, ‘Key Cases.’ In 1949 I note ‘Key Cases.’ Again in 1950, ‘Key Cases,’ and a second time in 1950——

“Mr. Adams: What is the purpose of this line of questioning?

“Q. (By Mr. White, continuing): ——again being indicative that——

“Mr. Adams: I object to this line of questioning as being irrelevant to the problem of license plate frames. What is the purpose of this?”

The Court: You can skip that colloquy.

“Q. (By Mr. White, continuing): ——again be-
least indicative on this card are some entries of a
number of other different products that Douglas
sells besides license frames? In other words, you
do sell other products besides license frames?

“A. Yes.

“Mr. Adams: He has already testified to that.

“Mr. White: Yes.

“Q. (By Mr. White, continuing): Those en-
tries on the card would be indicative of some of
the other products which you do sell? [164]

(Deposition of Stanley M. Olson.)

“A. Yes.

“Q. Now I have before me three license plate frames which have been respectively identified as Exhibits 5, 10 and 15. Now these three exhibits show that there are variations in the style of plate as sold by the Douglas Company, do they not?

“A. Yes.

“Q. In other words, it would be fair to say that from time to time you have sold license plates under various styles or changes of style?

“A. You mean by that the copy? Are you talking about copy now, or the shape?

“Q. The over-all style of these (indicating) frames?

“Mr. Adams: Style meaning appearance?

“Mr. White: Yes, style meaning appearance.

“Q. (By Mr. White, continuing): In other words, you have three different forms of plates here?

“A. You are wrong. There are only two. There are two different shaped frames before you.

“Q. Well, now, let me rephrase the question, then: Exhibit No. 5 is dissimilar from Exhibit No. 10?

“A. That is correct. They are two different frames. [165]

“Q. And Exhibit No. 10 is dissimilar from Exhibit No. 15?

“A. That is correct. They are two different frames.

(Deposition of Stanley M. Olson.)

“Q. And Exhibit No. 10 is dissimilar from Exhibit No. 15?

“A. It is not from our point of view because these areas (indicating)—the frame style is exactly the same. It is just a different size to fit a different state. It is the identical frame.

“Q. Well, now, in Exhibit No. 10, there is a deepened portion on the bottom and in Exhibit No. 15 there is a deepened portion on the top?

“A. However, that is the same frame.

“Q. Is that right? Is that statement correct or not?

“A. No, that's the same frame.

“Mr. White: Please answer the question and I move to strike the answer as not being responsive. I will rephrase the question again:

“Q. (By Mr. White, continuing): In the item identified as Exhibit No. 10 as intended in normal position upon an automobile, there is a deepened portion on the bottom of the frame? Is there not? [166] A. Yes.

“Q. In the item identified as Exhibit No. 15 as normally intended to be positioned upon an automobile, there is a deepened portion on the top of the frame? Is there not?

“A. Yes. They are both the same number.

“Mr. White: I move to strike that last part as not responsive.

“Q. (By Mr. White, continuing): At any rate, the Douglas Company does produce and has pro-

(Deposition of Stanley M. Olson.)

duced from time to time different style changes? I think you testified to that?

“A. We have made two different frames—excuse me, three different frames: No. 101, shown in the literature; No. 102, both top and bottom mount; and we have made 104, which is not shown in this literature.

“Q. So you have made changes and do sell different styles?

“Mr. Adams: He has already testified to that about four times.

“Mr. White: All right. That is fine. He has so testified.

“Q. (By Mr. White, continuing): Now as vice president in charge of sales and as sales manager, you [167] are the person in the Douglas Company that is primarily responsible for seeing that the products are sold? A. Yes.

“Q. Which I presume is a full-time job? Is that correct? A. Yes, plus.

“Mr. White: May I have the answer on that?

“(The answer was read by the reporter.)

“The Witness: Plus. I mean more than a full-time job.

“(Remarks off the record.)

“Mr. White: I think that is all.

(Deposition of Stanley M. Olson.)

“Redirect Examination

“By Mr. Adams:

“Q. I have just one or two questions, perhaps. You previously testified on direct, I believe, that Exhibits 10 and 15 bore the same model number as far as you were concerned, one being a top mount and one being a bottom mount?

“A. Yes. Exhibits 15 and 10 are both 102 frames; one is a top mount frame and the other is a bottom mount frame.

“Q. Top mount being which one? [168]

“A. Top mount is No. 15 and bottom mount, No. 10.

“Mr. Adams: At this time I would like to offer all of defendants' exhibits identified in this deposition, 1 through 15, into evidence for purposes of this deposition and for subsequent use at the trial.”

The Court: That may be omitted.

“Q. (By Mr. Adams, continuing): With respect to Exhibit 1, this is a piece of sales literature which you are thoroughly familiar with?

“A. Yes.

“Q. Did you approve this literature before it was ultimately printed up? A. Yes.

“Q. In the job of sales manager which you had at the time these invoices or sales orders were made up, it was your responsibility, was it not, to see that all of these orders were duly recorded by the company and that the salesmen's commissions were duly paid? A. Yes.

(Deposition of Stanley M. Olson.)

“Q. And that you personally were responsible for the keeping of these records? [169]

“A. That is, the people are responsible to me for these records?

“Q. Yes. A. Yes.

“Q. Similarly, that is true with respect to the customer cards, Exhibits 4, 8 and 14? A. Yes.

“Q. And as sales manager you are thoroughly familiar with all of the products consisting of license frames——

“Q. (By Mr. Adams, continuing): You are thoroughly familiar with all of the license frame products which the company has sold since your coming with the company? A. Yes.

“Q. And these frames constitute frames sold and are generally similar to the frames shown in Exhibit 1 with the exception that 104 is not specifically shown but replaces 101? A. Yes.

“Mr. Adams: That is all, I think.

“(Remarks off the record.)

“Mr. White: I think we should record that Mr. Palmatier is appearing as counsel.

“Mr. Adams: It makes no difference. [170]

“Q. (By Mr. Adams, continuing): Another question is how was the Exhibit 1 distributed and used by your company? I think you have testified to that but would you repeat it just briefly?

“A. This was mailed to automobile dealers and was also used by our salesmen as a catalog sheet.

“Q. Have you seen in use on the streets your

(Deposition of Stanley M. Olson.)

101 license plate frames, your 102 license frames, and your 104 license plate frames?

“A. Yes. We have seen them all.

“Q. Including the Kobb Motor Sales frames specifically? A. Yes.

“Mr. Adams: That’s all.

“Mr. White: No recross-examination.” [171]

* * *

GEORGE DuVALL

called as a witness by and on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Fulwider:

Q. Mr. DuVall, have you been connected with the license frame business? A. I have.

Q. Approximately when did you first become connected with that business?

A. I was connected with the firm of the [177] Southern California Plating, which is the parent company, from 1931 to——

The Court: Parent company of what?

The Witness: U. S. License Frame Company.

——at which time they were not making license frames, they didn’t start to make them until about 1935 or ’36, somewhere along in there.

Q. (By Mr. Fulwider): They were in the general plating business? A. That is right.

(Testimony of George DuVall.)

Q. Did you do any die casting at that time?

A. Die casting and auto accessories of various descriptions.

Q. Then how long did you stay connected with the Southern California Plating Company?

A. I was with the firm straight through from 1931 to 1951 without a break, and then I came back for another six months period in 1953.

Q. During the latter part of that period of your service a firm under the name of U. S. License Plate Manufacturing Company was carrying on the license frame part of the business?

A. That is correct.

Q. What were your duties, what was your capacity with that company? [178]

A. I was engineer for the firm and took care of, you might say, developing customers' ideas into producible form that could be manufactured.

Q. Did you have anything to do with preparing products for production or the tooling?

A. Yes, that was one of my primary jobs, to see that we made proper tooling as reasonable as possible to save the customer money and make a profit for ourselves.

Q. In that connection, I take it you had something to do with the manufacture or the design at least of dies used for making license frames?

A. Practically every one of them that was produced was put on paper before it was made, and I am the one that put it on paper.

(Testimony of George DuVall.)

Q. Then from that the tooling was manufactured? A. The tooling was manufactured.

Q. Are you familiar with tooling under the name of master dies for license frames?

A. Yes. A master die can be interpreted as a die that can have an adapter put into it with a cavity in which an insert can go; it can be made up of a number of pieces.

Q. Are there several different styles of master dies for die casting purposes?

A. There are several different styles. You can have one master die that is put on the machine that can make items [179] other than license frames on the same master die.

Q. In your experience in design tooling—first, let me ask, did you have occasion to be connected with the actual production of frames from the dies which you designed?

A. Yes, I did, clear through to the customer, because the customer's request, he often wanted something special, and it was up to me to put it on paper and get an approval either by the customer or his representative so that we could be sure that we were not spending a lot of money on dies that weren't correct.

Q. So you had to do with production, the actual production facilities, as well as the design facilities?

A. That is correct.

Q. As I understand it, different states have different sized license plates, is that correct?

(Testimony of George DuVall.)

A. In the period when the manufacture of license frames was first begun, we started off with dies that were in the western states, and then it spread all over the United States, and by the time we had them to cover most of the 48 states there were certain dies that were interchangeable with other states, merely by changing the lug facing or the facing of the little ear that holds the license plate to the car.

Q. I call your attention, Mr. DuVall, to Defendants' Exhibit C, which as I understand it is called a double header type plate. [180] A. Yes.

Q. The ears you were speaking of are these two (indicating)?

A. These two projections or holes here through which the plate of this particular state and the bracket on the car naturally have to be all fastened together to make it an integral part.

Q. Prior to the time you started making what are called double header frames, did you ever employ a double cavity or 2-cavity dies for making single heads?

A. Oftentimes we did, and one of the primary purposes of that was in order for some states, to produce a frame for some states and also produce it for another state, we would have a cavity on both top and bottom to change the distance between the lugs so that it would fit the other state's plate.

I don't know if that is understandable?

The Court: I do.

(Testimony of George DuVall.)

Q. (By Mr. Fulwider): I wonder, Mr. DuVall, if you would sketch out for the court a typical die of the type you have been speaking of wherein you have two cavities, one top and one bottom, that permit you to adjust the facing of those ears for different sized plates.

A. (Drawing on paper): I made this pretty rough, but [181] it will give you an idea of what we have in mind.

Q. Will you explain to the court the functioning of that?

A. The point I want to bring out is the fact that this would represent what we would class as a master die——

The Court: That is a double header?

The Witness: This happens to be a double header. That is the point I want to bring out.

This is all solid and then there is an adapter, let's say, at the top and the bottom. The bottom adapter that was made originally for our purpose, it was still a 2-cavity die but it was perfectly plain across the bottom making a plain frame, but the reason for that is that when this state took this size we would put an adapter in which—I will exaggerate it here so you can get an idea (drawing)—we would bring those ears in closer to fit another state, and that was the primary purpose of the two-cavity die.

Q. (By Mr. Fulwider): The correct way to describe dies like that, then, would be a double cavity die rather than a double header die?

A. That is true. In fact, our first ones were

(Testimony of George DuVall.)

double cavity dies principally for the purposes of changing the lug or mounting ear configuration.

Q. Do I understand it correctly, that double cavity dies are 2-cavity dies like you have sketched for us here [182] that have been common in the trade for many years?

A. Very definitely. A die can be made up with movable ends, movable top and bottom. They don't always have to be set directly in, they can come in from the outside and project a great distance beyond the die and still be functional in a die cast machine.

Q. Am I correct in that some master dies actually have the end sections of the die which forms the end sections of the plate, that they are movable in and out?

A. That is true. That can be done very easily.

Q. And that was standard practice?

A. That was done in practice.

The Court: You catch the varying length of license plates in different states?

The Witness: That is true. That is the reason for it. Any time you had a standard height on a plate, why you could use the same lengthening process. If it was a question of height of the frame and not the width, why then those two end pieces could be made a little longer and that would satisfy the use on, say, two or three states.

The Court: How many sizes of plates do they have, do you know?

(Testimony of George DuVall.)

The Witness: There were at least 30-some different sizes, in fact possibly closer to 40 different sized plates for the 48 states. [183]

There were very few of them at the time we first started in that were duplicates of one another.

The Court: In size?

The Witness: In size and especially the hole configuration.

Some of the sizes—now this will give you an example—there was one die which we called a 7-state die, and that die, without any moving in or out or up or down, was usable for seven states with the adapters that were used to change the hole spacing, and we were able to produce frames for those seven states.

Q. (By Mr. Fulwider): That was a double cavity die?

A. That was a double cavity die. In fact, it can be carried further, it can go to any number of cavities, but that is the primary purpose of a double cavity die.

Q. When you are making a frame with an enlarged, what we have been calling a header, at top or bottom or just a plain frame?

A. That is true.

Q. If you made just a plain frame with the dimension, the lateral dimension of the width of the plain frame part, if it was the same all the way around, you would still use this kind of a die, as I understand it?

(Testimony of George DuVall.)

A. That is true. You can still use this same die. [184]

Q. You have put a few marks on here. You would indicate this large rectangle as what, a die plate?

A. In our case we would call that a master die.

Q. Now the line leading from the cavity on the lower part of the die in which you have indicated an insert, you have marked that "adapter," is that correct?

A. That is correct. That is the part in which the actual engraved or embossed insert is inserted.

Q. Will you do the same thing to the upper one?

A. We will put the insert here (marking on document). I would say in standard die practice this would be the normal name given to them.

Q. You have marked "insert" with a line and arrow to that portion of the adapter carrying the name, is that right?

A. That is right. I will put in "name." (Marking on document.)

Q. And the part you have marked "adapter" is the entire block, shall we call it, that sits in the cavity?

A. Right. This would be called a plain adapter.

Then this would be for some other state (indicating), and this can be applied to both the top or bottom. That is one of the primary purposes of making that double cavity die.

Q. In other words, one of the reasons for mak-

(Testimony of George DuVall.)

ing a double cavity die is that so you can readily insert it and have an insert top or bottom? [185]

A. That is right, from an economy standpoint, if nothing else, because if it is made out of the finest or the best of tool steels, the way it should be, it can run up into thousands of dollars. As a rule they run maybe in the neighborhood of \$1,200 or \$1,400 to get set up, and by a change of \$75, or \$50, or \$100, you could make it fit another state.

Mr. Fulwider: I would like to have the sketch that the witness has just made marked as Plaintiff's Exhibit 5.

The Court: Admitted.

(The sketch referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Fulwider): Now, Mr. DuVall, were you with Southern California Plating Company when they started making what are now known in the trade as double header frames?

A. Yes, I was with them at the time.

Q. Double header frames similar to Exhibit 3? That I believe is a U. S. License frame, is it not?

A. Yes, that is right. I can tell by the front of it, not even looking at the back.

Q. Now as I understand it, these master dies that you discussed and sketched for us on Exhibit 5, were in use for quite some period of time prior to the time that your company started making double header frames?

A. Definitely. It was for a good purpose, I mean

(Testimony of George DuVall.)

for [186] enabling the firm to make plates for other states as well as the one for which the die was originally intended.

Q. So that as a practical matter and solely for economic purposes you had been employing double cavity dies for some years prior to the time you started making double header frames?

A. That is true.

Q. Was that the general practice in the trade, do you know?

A. I am sure that it would be from an economical standpoint because, as I mentioned before, when you can adapt one die to make something for a different configuration you are saving money.

Q. Can you tell me approximately when U. S. License Frame started making double header frames?

A. I believe it was in '48. You probably have here in court the official record of exactly when it was.

Q. It was while you were with the company?

A. I was with the company, yes, sir.

Q. In 1948? A. Yes, sir.

Q. Did you have any discussions with Mr. Bes-solo and/or Mr. Bell at the time that the idea or design, shall we say, for double header frames was brought up?

A. Yes, I did, although not being the inventor my job [187] was to take any idea and put it on paper to see the feasibility of it, maybe make a

(Testimony of George DuVall.)

sample, and have it in a condition that we would be able to show it to a customer.

Q. At the time Mr. Bessolo suggested to you, and possibly Mr. Bell, his idea or design for the double header frame similar to the one you have in front of you, Exhibit 2—and I will show you a copy of Exhibit 1, the patent in suit—had you ever seen a double header frame on the market or elsewhere?

A. No, I hadn't. In fact, it was through our discussion at the moment that we thought it would be a good idea to do just this, patent it, and that is the reason that Joe asked me to make sketches that could go to the patent attorney.

Q. Was it part of your job to keep abreast of what was going on in the license frame business as to competitors' products?

A. I would say it was. You can't tie my position down to one particular category, because it doesn't mean just sitting at the board making engineering drawings and tool and die designs; it went further than that, because I was interested in promoting the products for the company which would make it a more substantial job for myself. I was in more or less of a foremanship capacity in the plant. I didn't have any one specific duty. [188]

Q. Did you, as part of your duties, talk to customers and discuss with customers new ideas, new designs?

A. Definitely, although I might not have com-

(Testimony of George DuVall.)

pleted the terms, I would have to get the mechanical details correct before we started a die.

The Court: Did you make the drawings that appear on the patent, the original drawings?

The Witness: I made the drawings from which these were made. I think the patent draftsman actually drew these up in India ink, but I made the ones from which these were made.

The Court: When did you make those, do you recall the date?

The Witness: I don't recall the date exactly.

The Court: Was it in 1948?

The Witness: It was in '48, I am sure.

The Court: Was it before December, 1948?

The Witness: Yes, I am sure it was.

Q. (By Mr. Fulwider): Let me ask you this question: Did you make up any drawings for inserts or modifications of dies pertaining to the first double header frames made by U. S. License Frame of Southern California Plating?

A. Would you state that again? Did I make any what?

Q. Did you make any drawings or design any inserts or any tooling having anything to do with the building of the [189] first double header frames?

A. Definitely. It was my job to see that it got done.

Q. Do you know how the sales of this first double header frame were?

A. I have an idea. On that score it wasn't received very well right at the beginning, the price

(Testimony of George DuVall.)

was high because we had duplicate work to do all the way down the line. But as time went on we would find easier methods of doing it and save on our tooling cost. Then the sales picked up steadily, I would say, from its very inception.

Q. Up to the time that you left the company, I believe in 1951, by that time how did the sales of the double header frames compare with the single header frames?

A. I would as an estimate believe that it was probably half and half, in other words, almost 50-50, as many of the customers would like to retain their single header frames. However, when we were able to sell them on the higher-priced frame we did so because a higher-priced item gives you a little more margin.

Q. After you came on the market with the double header frame, did you have any competition from others making double header frames similar to yours?

A. Yes, there was. It seemed as though very shortly after we started, I would say in a matter of months, shortly after the frames were on the market, the demand became pretty [190] great and we, having set up to do it, would fill all the orders we could.

But it seemed as though some of them slipped away due to competition. Others had started to make them and cut the price.

Q. Do you know whether or not the competition

(Testimony of George DuVall.)

in double header frames attracted the sales of Southern California Plating or U. S. License Frame, rather?

A. Well, I would say it did, because at the moment it was becoming a very popular item, and due to the fact that it was becoming a popular item, you might say dollar-wise it was the bulk of our sales because of the additional price. They were almost—well, they were quite a few cents apiece above the price of the single header frames.

Q. I believe I asked you this, I am not sure, though; prior to the time that U. S. License Frame came on the market with the double header frame similar to the Bessolo patent, had you ever seen any double header license frames on the market at all?

A. No, I really had not, and I think had there been, I was interested enough in the type of work we were doing, to run across some of those.

Mr. Fulwider: That is all, your Honor.

The Court: Cross-examine. [191]

Cross-Examination

By Mr. Young:

Q. Mr. DuVall, I believe you said you left the U. S. License Frame Company in '51 and you had a 6-month return in '53, is that right?

A. That is right.

Q. What is the name of your present employer?

A. I am employed at Librascope in Glendale, and I am a designing engineer. I am still following

(Testimony of George DuVall.)

the same line that I followed from the very beginning.

Q. Will you tell me what company you went with in 1951 when you left the U. S. License Frame Company?

A. That was a company that was in the manufacture of doors and window sash. The name of the company was Weathervane Corporation, and it was entirely in a design capacity also.

Q. Did you return from that company to U. S. License Frame?

A. Not directly. I had made my business designing and I went from that company to a company called Precision Engineers, which was later changed to—it was Precision Engineering Manufacturing, Inc.—it was changed to Prestoline Corporation. That was in a design and engineering capacity for their particular product, straightening them out on blueprints and the engineering department. [192]

Q. At the present time do you have any connection with Mr. Leonard DeBell?

A. He is a personal friend and aside from that I have had no business connection other than at various times to take care of engineering jobs that he might have to offer.

Q. Do you do those on a part-time basis at the present time?

A. That is correct, a part-time basis.

Q. Are you now working on engineering jobs for Mr. DeBell?

A. That is correct.

(Testimony of George DuVall.)

Q. Do they have anything to do with license plate frames?

A. It does not whatsoever. It is entirely aside from that.

Q. Mr. DuVall, I believe you said you made the drawings from which the Patent Office draftsman made the final drawings that were mailed to the Patent Office?

A. As I understand, and you being an attorney you know, that a certain form has to be used to make the actual drawings.

Q. Yes, that is right. But the sketches you submitted resulted in drawings made by a draftsman who used India ink? A. That is right.

Q. And those were sent to the Patent Office, is that [193] right?

A. Let us put it this way: Taking an idea from an inventor, who is ordinarily a layman, he has an idea in his mind, he cannot express it on paper exactly the way he would like to express it, so that is where the draftsman or designer fits in.

Q. Do you recall when Mr. Bessolo came to you with his idea?

A. I do, because I was employed there. I had a little separate office right at the firm.

Q. When was that? A. That was in '48.

Q. Do you know what time in 1948?

A. That I do not remember.

Q. What did Mr. Bessolo bring to you?

A. Merely pencil sketches giving the idea of the double header frame.

(Testimony of George DuVall.)

Furthermore, he had taken a frame and made a cardboard cutout showing the way the thing would look if it were made in a double header frame.

Q. You are quite certain that the cardboard cutout related to this particular design as shown by Plaintiff's Exhibit 1?

A. What is Plaintiff's Exhibit 1?

Q. The patent before you. [194]

A. Excuse me.

Yes, it was primarily for that purpose.

Q. Was it for any other purpose?

A. The only other purpose it could be for is to convey the idea to those that would have money to finance the thing, to build dies and put the thing over, get it rolling.

Q. You are quite certain that you saw a cardboard model? A. Definitely.

Q. On this particular design?

A. Very definitely.

Q. And Mr. Bessolo gave that to you?

A. That is true.

Q. Do you know whether Mr. Bessolo ever gave you cardboard models of other designs of license plate frames?

A. I don't recall any in particular. I will say no.

Q. Then Mr. Bessolo gave you this cardboard model, which had been a cutout, I take it?

A. That is true.

Q. Cut out of a larger piece of cardboard?

A. Yes, large enough to represent a frame.

(Testimony of George DuVall.)

Q. Did you see him work on it or did you see it after it was complete?

A. I saw it after it was complete, very definitely.

Q. Do you know whether he did it with scissors or with [195] a knife?

A. I think it was pretty rough.

Q. Do you know whether he made it at the plant or not?

A. That I do not know. He may have made it at home or any place else.

Q. Do you recall now whether the gist of the idea that he gave you to draw was that of a double header frame of any style or particular style?

A. That I can't answer. I don't know.

Q. You don't remember whether the cardboard model, then, was exactly like these drawings or not?

A. It had a name in it. It didn't say "dealer" and it didn't say "city," if that is what you are getting at.

Q. No, I am just getting at the fact that the patent in front of you has a wide advertising space in one place and a narrow one at another, and that the advertising space does not extend completely across the length of the frame in either case.

A. That is right.

Q. Was the model just like that?

A. I would say it was. I will tell you, if you show me any of the exhibits, I can identify them by looking at them. After all, that is quite a few years ago.

(Testimony of George DuVall.)

Q. Do you know where that cardboard model is now? A. I do not. [196]

Q. Do you know what you did with it after Mr. Bessolo gave it to you?

A. I do not remember exactly what was done with it. I don't save all of that or I would have too much.

Q. Did you have the job of sending the drawings that you made to the man who made the patent drawings?

A. That was not exactly my job to do, because I was not the one taking out the patent.

Q. What did you do with the drawings that you made and which you believe resulted in those patent drawings?

A. They were left with Joe Bessolo or Mr. DeBell, I don't know which.

Q. You don't know what you did with those drawings?

A. They were turned over under Joe's supervision, or if Joe turned them over to the patent attorney to get a patent on it, that is where they are.

Q. And it is just the result of your recollection at this time that you say that the cardboard model was like the patent drawings?

A. I would say it would constitute a suitable design of the same thing that is on this patent drawing.

Q. By that you mean to say it was enough to give you an idea of what he had in mind?

A. That is true.

(Testimony of George DuVall.)

Q. From which you made a drawing? [197]

A. That is correct. His sketches would substantiate—I put it in better form so that the patent drawings could be made from that. That is the point.

Q. Do you know if Mr. Bessolo saw the drawings that you made?

A. I am sure he did, if he took them to the patent attorney; yes, sir.

Q. As I understand it, you weren't sure whether you gave them to Mr. DeBell or to Mr. Bessolo?

A. That is true. After all, we were an organization.

Q. You were quite sure that Mr. Bessolo saw those drawings before they went to the Patent Office? A. Very definitely.

Q. Did you make an exact reproduction of the cardboard model? Was the drawing you made exactly the same as the cardboard model?

A. It is pretty hard to make something exactly like something else. It is approximate, let's put it that way. I would say yes.

Q. Could the cardboard model have had areas for the reception of letters which extended entirely across the length of the frame?

A. It could have.

Q. Could the cardboard model have any stippling on it?

A. When you make a drawing you do not put stippling on [198] a drawing to show the customer,

(Testimony of George DuVall.)

you merely paint a black background. That is normal procedure.

Q. I call your attention to the fact that the drawing has stippling shown in the two areas so that the drawing you made did not have any stippling. A. No.

Mr. Young: That is all.

The Court: Any redirect?

Mr. Fulwider: Just one question.

Mr. Young calls my attention to the fact that we didn't offer in evidence the order and invoice pertaining to the first sale as mentioned in the file wrapper of the Bessolo patent.

I would like to have marked as our Exhibit No. 6 the order—I guess you would call it an order—No. 1201.

(The documents referred to were marked Plaintiff's Exhibit No. 6 for identification.)

Mr. Fulwider: And as Exhibit No. 7 the invoice dated April 10, 1948.

(The invoice referred to was marked Plaintiff's Exhibit No. 7 for identification.)

Mr. Young: Before these are admitted in evidence I assume you will have somebody to identify them?

Mr. Fulwider: Yes. That is why I brought them up now. I will have Mr. DuVall do it. [199]

The Court: You say they are referred to in the file wrapper?

(Testimony of George DuVall.)

Mr. Fulwider: Yes, in the statement of the concession toward the end of the Bessolo file wrapper signed by Gazan, there is a recitation of the evidence which was submitted at that time, and there is mentioned these two exhibits.

The Court: Very well.

Redirect Examination

By Mr. Fulwider:

Q. Mr. DuVall, while you were with the company, U. S. License Frame, in 1948, you were familiar with their records, were you not?

Mr. Young: Your Honor, I object to this leading form of question. I think he should ask him if he was familiar with the records.

The Witness: Either way I was.

Q. (By Mr. Fulwider): Can you identify for me this Exhibit 6? A. (Examining exhibit.)

Q. Is that a usual form that was used by U. S. License Frame?

A. At that time this was the usual form, and I recognize the customer as being one—in fact, I think this was the very first order.

Q. For the double header frame? [200]

A. For the double header frame.

Q. Is that the type of record that was kept in the usual and ordinary course of the company's business? A. Yes, it was.

Q. Did you have anything to do, or do you recall, with this particular order?

(Testimony of George DuVall.)

A. I know I made the actual sketch that was approved by the customer.

Q. By the Ridings Company?

A. It would be H. E. Ridings, that is right.

Q. And what did this call for?

A. It calls for 300 pieces, sample, Cadillac in script, set on top in chrome, black background, and 500 bottom insert only.

So that is an order for 300 double headers and 500 single headers.

Q. And the date of this?

A. The date is 3/6/48.

Q. That is March 6, 1948?

A. That is right. It would have to be prior to that that the drawing was made. That is the reason that I couldn't have said the date.

Q. Now, calling your attention to Exhibit 7, an invoice dated April 10, 1948, to the Ridings Motors in Long Beach, can you identify that as the usual type of record [201] used by U. S. License Frame Company at that time?

A. That is correct. This is an invoice. This represents an invoice and a delivery slip, both referring to the same items.

The Court: Let me see them.

(The exhibits referred to were passed to the Court.)

The Witness: The one signed by Mr. Ridings is the receipt for the goods; the one typed is the typed

(Testimony of George DuVall.)

statement that gets mailed after the delivery has been made.

Mr. Fulwider: I offer those in evidence, your Honor, as Plaintiff's Exhibits 6 and 7.

The Court: Admitted.

(The exhibits previously marked Plaintiff's Exhibits Nos. 6 and 7 for identification were received in evidence.)

Q. (By Mr. Fulwider): Now, Mr. DuVall, after the order, Exhibit 6, was received, did you have anything to do with the preparation of the inserts or dies for the production of that order?

A. It was my job to see that the die was set up so that it would cast that particular configuration. I followed it all the way through, probably to the point of sending samples, if they were necessary for approval.

Q. Do you recall whether you made a special die for that first order or were you able to adapt other dies that you had? [202]

A. We adapted probably our present die in order to make the double header, but it was the natural thing to do.

Q. You say you adapted the present die. That I take it, must have been a double cavity die, then?

A. It was either a double cavity die at the time or it could have been a double cavity die before that time for this purpose that we mentioned before, which was for the shifting of the lugs.

Mr. Fulwider: That is all.

(Testimony of George DuVall.)

Mr. Young: No further questions.

The Court: Just a moment. Which one of these indicates that this is to be a double header, Exhibit 6 or Exhibit 7?

The Witness: This is a delivery ticket of the goods that were sent to Ridings and it is this top line that says that. It is the 300 item.

The Court: Is that "sample"?

The Witness: Per sample.

The Court: Cadillac?

The Witness: Cadillac, in script, set in top of frame.

The Court: That is in the top?

The Witness: That is right.

This had the bottom insert only, but on this one, this group, that was a double header deal. (Indicating.) This is the bottom insert only.

The Court: And the bottom insert went on all of the 300 [203] and then they had 200 extra with the bottom insert only?

The Witness: That is right.

The Court: With the word "Ridings"?

The Witness: Yes.

The Court: Very well.

Q. (By Mr. Fulwider): I believe, Mr. DuVall, the differential in price also indicates that, does it not?

A. Oh, yes. On one I think you will find \$1.60 and on the other——

The Court: \$1.15.

The Witness: Yes. That represented quite a dif-

ference in price. That is the reason they ordered the plain ones. [204]

* * *

HARRY H. STAPLES

called as a witness by and on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. William K. Young:

Q. Mr. Staples, have you been identified with the automobile industry in years past in Southern California? A. Yes, sir.

Q. When did you initially become identified with it? A. In California since 1932.

Q. Will you please state generally the nature of your different identities with the industry?

A. Yes. I was in the Ford business in Hollywood from 1932 until 1937.

Q. What was the name of that firm?

A. Gray Motor Company.

Q. What was your connection with it?

A. Salesman. [205]

Q. Did you deal exclusively in new automobiles or used? A. New and used; yes, sir.

Q. And cars other than Fords?

A. Used cars other than Fords; yes, sir.

Q. Were you active in that business continuously during that period of time? A. Yes.

(Testimony of Harry H. Staples.)

Q. Generally in the sale of new cars and the purchase and resale of used cars?

A. That is right; yes, sir.

Q. Where were they located in Hollywood?

A. They were in the 1700 block on Cahuenga. They went out of business in 1935, I believe, and sold out to Douglas Appel White, who later sold out to Al Stubing.

Q. They were a Ford distributor?

A. Yes, sir.

Q. After 1937, what was your identity with the business?

A. I went out to Beverly Hills with Herbert E. Woodward in Beverly Hills.

Q. When was that? A. In 1937.

Q. How long did you remain with him?

A. I was with him until 1942.

Q. In what capacity? [206]

A. Well, I was assistant to the general manager most of the time; salesman when I first went there.

Q. Were they distributors for some particular car? A. Ford and Mercury at that time.

Q. Was your experience with them the same as it had been with the Gray Motors?

A. Yes, sir.

Q. What was your further connection in the industry?

A. I went in the service in 1942 and '43, and when I came back I was with Al Hurd, a used car dealer in Hollywood, until 1944.

(Testimony of Harry H. Staples.)

Q. Did they deal in various kinds of cars?

A. Just used cars. That is all we had at that time.

Q. Then from 1944 on?

A. From 1944 I went to Salinas, and I was general manager of the Ford dealership at Salinas.

Q. For how long?

A. Until September of 1945, when I came back to Beverly Hills.

Q. Then what did you do?

A. I came back as general manager and part owner of Herbert E. Woodward, Inc., in 1945, the fall of 1945.

Q. Were they distributors for some car?

A. Ford and Mercury, the same as they were. I was with them in 1937, you see, and came back with them. [207]

Q. So they were Ford distributors at that time?

A. That is right.

Q. How long did you remain there?

A. Until I sold out in August of 1955.

Q. August of 1955? A. Yes, sir.

Q. Were you identified with any other organization?

A. No, sir, just except myself. In 1951 I changed the name of the place to my own.

Q. And what was that name?

A. Dick Staples. We became a Dodge and Plymouth dealer in 1945, incidentally, but at the same location.

(Testimony of Harry H. Staples.)

Q. They were Ford dealers as well as Dodge and Plymouth?

A. No, we gave up Ford and became Dodge and Plymouth dealers in 1945.

Q. So from 1945 to 1955 you were the owner?

A. Manager and part owner until 1951. Then I was sole owner.

Q. Now, during this period that you have related, did you have any experience with reference to the purchase or sale of license frames?

A. Yes, sir.

Q. For automobiles? A. Yes, sir. [208]

Q. Will you just state in a general way how extensive that was, if at all?

A. Well, when we started getting cars in March, I believe, of 1946, we were Dodge-Plymouth dealers then, we didn't have many cars, and I don't recall just when we started getting license frames, whether we installed them right at first, but I eventually contacted Mr. DeBell of the Southern California Plating Company and bought all my frames from him.

Q. Previous to that did you acquaint yourself in any way with what was available on the market with reference to license frame plates?

A. No, sir, not before that.

Q. You did not acquaint yourself?

A. No, sir.

Q. Were you familiar with the various types of frames that were on the market previous to that

(Testimony of Harry H. Staples.)

time from the observation of vehicular traffic on the street or in the jobbers' offices?

A. I know the difference between the types of license frames.

Q. That is what I was asking you.

A. Yes.

Q. If you had any acquaintance with the various types of license frames that were available on the market.

A. Not extensively, no, sir. [209]

Q. To the extent that you knew of the different kinds of types?

A. Well, I knew the different types, yes.

Q. What was your knowledge in that regard?

A. The first plates that we had when we were under the name of Herbert E. Woodward was a single plate, I mean a type with a name at the top, nothing else.

I later changed to what we call the double header type.

Q. When did you change to the double header type?

A. That I can't tell you exactly, but it was quite some time because when I changed the name of the organization in 1951, I called Mr. DeBell and asked them to change the name of the Herbert E. Woodward to Dick Staples, which was the name of my corporation then, and that was a type which I have used until I went out of business in 1945. It was a double header type. I don't remember particularly of having any other type of frame.

(Testimony of Harry H. Staples.)

Q. Does your memory serve you as to the time when you first purchased or got double header license frames?

A. It was years before I changed my name. I can say that truthfully.

Q. From whom did you acquire your first double header license frames?

A. From the Southern California Plating Company.

Q. That is the U. S. License Frame, Mr. DeBell? [210]

A. Yes, sir.

Q. Prior to that time did you ever acquire any double header license frames from any other source?

A. No, sir.

Q. State whether or not prior to that time you observed, either on vehicular traffic or otherwise on the market, any double header license frames in California.

A. Yes, numerous times.

Q. You did so before?

A. Yes. I don't say before I purchased mine, though.

Q. That is what I am asking. Before you purchased your initial order of double header license frames, had you ever seen that type before?

A. No, I don't recall of having seen any on the market.

Q. In connection with your business and identity with the industry, you observed from time to time the various types of frames that were on the market and attached to automobiles, did you?

A. I naturally would; yes, sir.

(Testimony of Harry H. Staples.)

Q. And you have never seen that double header type frame before? A. No, sir. [211]

* * *

WALLACE TITZELL

called as a witness by and on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Fulwider:

Q. Mr. Titzell, were you ever employed by Southern California Plating Company?

A. I was.

Q. Or Mr. Leonard DeBell? A. I was.

Q. During what years?

A. I started to work for Mr. DeBell, Southern California Plating Company, in August of 1939.

Q. How long did you continue with that company? A. Until the summer of '45.

Q. Then did you at any subsequent time work for that [212] company?

A. I did. I returned in 1949, in the fall.

Q. How long did you continue there?

A. I worked for the company until eight days ago.

Q. You are no longer working for that company at the moment? A. I am not.

Q. What were your duties or what was your position during the period 1939 to 1945?

(Testimony of Wallace Titzell.)

A. Primarily in sales, although in a small company you get involved in a lot of other detail.

Q. You say you were concerned primarily with sales. Was that calling on customers or handling them in the office, or both? Elaborate a little.

A. It was general office procedure connected with sales.

Q. Did you have anything to do with the production or the shop during that time?

A. Yes, I did.

Q. What was your capacity with the company when you came back in 1949 up through 1956?

A. It was primarily the same, broadened probably a bit through experience that I had gained in the interim, and therefore my duties were broadened to production, more or less general shop foreman, you might say, along with sales. [213]

Q. As part of your duties did you keep abreast of what was going on in the trade as to license frames? A. I did.

Q. Was that true all through the time of your employment with Mr. DeBell? A. It was.

Q. Had you had any connection with plating or die casting companies, or the license frame business, prior to going with Southern California Plating in 1939? A. No, I did not.

Q. What had been your activity or your business prior to that time? A. Advertising business.

Q. Now, you are familiar with the Bessolo patent, I believe, Exhibit 1? A. I am.

(Testimony of Wallace Titzell.)

Q. And you are also familiar with the license frames made by U. S. License Frame Company similar to Exhibit 3, are you not?

A. I am familiar with them.

Q. Prior to your leaving the Southern California Plating Company in 1945, had you ever seen any double header license frames anywhere?

A. I had not.

Q. When you came back in 1949, do you recall whether [214] U. S. License Frame was manufacturing double headers then? A. They were.

Q. Tell me, were there very many companies manufacturing in this area, manufacturing license frames, prior to the war, that is, prior to December, 1941, during your first two years with Southern California Plating?

A. To my knowledge there were only two other companies.

Q. Who were they?

A. Shehan and Martin, I believe was in business at that time.

Q. At least the bulk of the business, as far as you knew, was being done by those three companies? A. That is correct.

Q. But it wasn't very difficult for you to keep abreast, I take it, of what your competitors were doing at that time? A. That is right.

Q. Was the same true, do you recall, when you came back in 1949? A. No, it was not.

Q. Were there quite a number of companies then?

(Testimony of Wallace Titzell.)

A. To my knowledge there were six or seven at least in the business.

Q. In this area? A. That is correct. [215]

Q. Now, can you tell me something about the sales picture of the double header frame, particularly as contrasted to the sales of the single headers at the time you came back with the company in 1949 and from then on up until the time you left the company this current year?

A. There was a steady demand for double header frames, and the sales of the single header frame seemed to drop off primarily because of the advantage of the area of advertising appearance of it, the balanced appearance of it, versus the old single header frame.

Q. Did the sales of double headers ever surpass the sales of single headers during the time you were with the company? A. In some areas; yes.

Q. Both are still being sold, I take it?

A. Yes, sir.

Q. You came back in 1949. Were other companies making double header frames at that time similar to the Bessolo patent design frame?

A. To my knowledge all of them were. They all looked identical.

The Court: When was this?

The Witness: In 1949.

Mr. Fulwider: In 1949 when he came back with the company. [216]

To elaborate, the record shows that the design

(Testimony of Wallace Titzell.)

was invented about March, or prior to March, and that the Ridings sale was made in March.

The Court: 1948?

Mr. Fulwider: 1948, yes. And the patent was filed in January of 1949.

The Court: February 14, 1949.

Mr. Fulwider: You are right. I am sorry.

The Court: And in 1949 when he came back everybody else was making double header plates?

Mr. Fulwider: That is right, your Honor. We started in 1948 and by the time Mr. Titzell came back, it is my understanding that practically all the companies were offering double header frames by that time.

Q. Do you know of a company by the name of the Douglas Company back in Minneapolis?

A. I do. I am familiar with it.

Q. Were they ever distributors for the U. S. License Frame Company?

A. They were distributing the frames when I returned in 1949.

Q. Did they continue to handle your products for some time after that?

A. They did for about three years, three and a half years. [217]

The Court: You do not know whether they were a distributor in 1948?

The Witness: I do not, sir.

Mr. Fulwider: I believe that is all.

The Court: Cross-examine.

(Testimony of Wallace Titzell.)

Cross-Examination

By Mr. Young:

Q. Mr. Titzell, I hand you Defendants' Exhibit H, which is a patent to Gazan, No. 167,885. I believe you have stated that there were a number of firms making double header type frames when you returned to the U. S. License Frame Company in 1949. Do you make any distinction between the type of frame shown in the Bessolo patent, which was before you, and those shown in the Gazan patent?

The Court: I do not understand your question.

Mr. Young: The question is——

The Court: Does he make any distinction?

Q. (By Mr. Young): When you refer to double header frames, did you refer to both of those or to one or the other?

Mr. Fulwider: I would like first to object to the question and secondly to his statement. As far as I recall, all of my questions of this witness had to do with double headers similar to our Exhibit 2 and to the design. When I said "double header frames" I meant to refer back to the ones we [218] were talking about.

The Court: You did not. Your question was whether or not when he came back in 1949 all the companies were making double header frames.

Mr. Fulwider: My question was supposed to be directed to double headers of the particular design of the Bessolo patent.

(Testimony of Wallace Titzell.)

Q. (By Mr. Young): Would your answers be the same if the questions were phrased in that way?

A. Will you repeat that, please?

The Court: Mr. Fulwider, it is his question. You had better straighten your witness out or straighten the record out because as it is now counsel is correct in his cross-examination.

Mr. Fulwider: I am sorry.

Mr. Titzell, when you came back to the Southern California Plating Company or U. S. License Frame Company in 1949, were there other companies selling double header frames substantially identical with the Plaintiff's Exhibit 2, the frame in front of you, and the patent, Plaintiff's Exhibit 1?

The Witness: Yes.

Q. (By Mr. Young): And by "substantially identical" would you mean to include the design such as shown in the Gazan patent? [219]

A. No.

Q. Then these other companies that you refer to in your opinion were making designs like that shown in the Bessolo patent?

A. That is correct.

Q. When you refer to double header frames, you refer to designs as shown in the Bessolo patent and no other?

A. I did when I answered that question; yes, sir.

The Court: Were they selling double headers like the Gazan patent, too?

(Testimony of Wallace Titzell.)

The Witness: The Southern California Plating Company were.

The Court: The Southern California Plating Company?

The Witness: We designed this originally.

The Court: You designed them, designed the Gazan design?

The Witness: That is my understanding. It was made by them when I returned in 1949, this identical frame was being made.

The Court: In other words, the Southern California Plating Company is the forerunner of the U. S. License Frame Company?

The Witness: That is correct.

The Court: So they were making both frames, the Bessolo and the Gazan? [220]

The Witness: That is right.

Q. (By Mr. Young): Do you consider the Gazan frame to be a double header frame?

A. I do; yes, sir.

The Court: Has the Gazan frame had the trade acceptance that the Bessolo frame has, I mean the type?

The Witness: In my opinion it has not.

Q. (By Mr. Young): Are there other double header frames on the market now so far as you know which have the advertising space extending completely across the top or the bottom and which are 2-line frames? A. Yes.

Q. Is that a popular frame, in your opinion?

(Testimony of Wallace Titzell.)

A. In what degree?

Q. Has it had the trade acceptance comparable to the sales you relate to the Bessolo patent?

A. Not in my opinion.

Q. Would you say that there are more frames in existence now like the Bessolo 2-line frame than all of the other 2-line frames of which you have knowledge?

A. I can only answer that by saying that there are more dies on file at the U. S. License Frame covering this patent. [221]

The Court: "This" meaning Bessolo?

The Witness: That is correct.

The Court: Than any other?

The Witness: That is correct.

Q. (By Mr. Young): Do you have any knowledge of the relative importance of that style shown in the Bessolo patent and the other two manufacturers you mentioned?

The Court: Important to what?

Mr. Young: Sales importance.

May I rephrase that question, please?

The Court: Yes.

Q. (By Mr. Young): I believe you have stated that U. S. License Frame Company, the Bessolo style frame, has the greatest trade acceptance?

A. In my opinion, yes, sir.

Q. Do you know whether that is true of the other two companies whose names you mentioned?

The Court: That makes license frames?

Mr. Young: Yes.

(Testimony of Wallace Titzell.)

The Court: He said now there are six of them. He said from 1945 there were only three companies that made them.

The Witness: That is correct.

The Court: And when you came back in 1949, up until [222] eight days ago, there were six?

The Witness: At least six.

* * *

ROBERT W. BROWN

called as a witness by and on behalf of the plaintiff under Rule 43(b), having been first duly sworn, was examined and testified as follows: [223]

* * *

Direct Examination

By Mr. Fulwider:

Q. Mr. Brown, you are one of the defendants in this case, I believe? A. That is right.

Q. You are also president of the Robert W. Brown Company, Inc., a co-defendant in the case?

A. That is right.

Q. And a director of that corporation?

A. Yes.

Q. Who are the other officers and directors?

A. My wife Olive, and we have my attorney, Sidney R. Traxler, as secretary and treasurer.

Q. And he is now?

A. Yes. He wasn't for over a year and a half, but we reappointed him and he has accepted, so he is now again.

(Testimony of Robert W. Brown.)

Q. He resigned and we dismissed as to him and now he is secretary again?

A. Yes. It is strictly in an attorney capacity.

Q. He is not a stockholder?

A. No, he is not.

Q. Is he a director as well as being secretary?

A. Well, he is secretary and treasurer of the corporation. That would make him a director, too.

Q. That is, you are going to make him a director? [224]

A. Yes.

Q. And your wife, I take it, is probably vice president?

A. My wife is vice president.

Q. No other officers?

A. No other officers.

Q. No other directors?

A. No other directors.

Q. When was the Robert Brown Corporation formed?

A. In July, 1953.

Q. As I recall the testimony in your deposition, in July, 1953, you had been doing business for some time individually under a dba Robert Brown & Co.?

A. That is correct.

Q. When did you start doing business as Robert Brown & Co.?

A. May, 1952.

Q. Has any stock ever been issued in the Robert Brown Corporation?

A. Yes.

Q. To whom was it issued?

A. To myself.

Q. Are there any other stockholders?

A. No other stockholders. I am the only one.

Q. You are the sole stockholder? [225]

A. Yes.

(Testimony of Robert W. Brown.)

Q. I take it, then, you have the whole say as to what the corporation does and does not do?

A. I have.

Q. Now, I believe in September of 1952, you made a business arrangement with U. S. License Frame Company, did you not? A. I did.

Q. And that was to get orders for frames manufactured by them for which they charged you a fixed price and you made the difference between their price and what you could get from the customer, is that a fair statement of the situation?

A. It is not correct at all.

Q. Will you tell me what your business arrangement was?

A. My business arrangement with them was—I had been in business for myself as a jobber—

Q. As a jobber?

A. As a jobber, and I had taken orders, and I went to them to ask them if they would like to manufacture frames for me on my orders. They accepted the proposition, the same as any other jobbers in the field.

The Court: They gave you a fixed price?

The Witness: They did.

The Court: And you sold it at whatever profit you could make above that? [226]

The Witness: That is right.

The Court: That was his question.

The Witness: Well, he said I went to them to sell for them, and I didn't.

(Testimony of Robert W. Brown.)

Q. (By Mr. Fulwider): They made the frames that you sold and they billed the customer, did they not? A. They did.

Q. Then the customer was supposed to remit directly to U. S. License Frame?

A. That is right.

Q. But in some instances, as I understand it, during the short period you were connected with that company you collected and transmitted the money to U. S. License Frame?

A. Yes, I did. I believe there was an instance or so.

Q. As I understand it, in November you and Mr. Titzell and/or Mr. DeBell could not agree as to this procedure of yours, of wanting to take the orders in your own name, is that correct?

A. That is right. They wanted me to take it on their order blank, which I refused to do.

Q. So you terminated your relationship with them in, I believe, November, was it?

A. I believe it was November.

Q. 1952? [227] A. Yes.

Q. Prior to that time one of the orders which you had brought in was this order from Eddie Nelson in Huntington Park, about which we have had testimony, is that correct? A. That is right.

Q. The license frame, Exhibit 3, is one identical with frames supplied by U. S. License Frame to Eddie Nelson on that order which you obtained, is it not?

(Testimony of Robert W. Brown.)

A. Well, it has Eddie Nelson on it, so I imagine it was made for them.

Q. Will you examine it?

A. I can see it has Eddie Nelson on it, so it must have been made for him.

Q. I mean, this is a frame made by you—that is the style of frame made by U. S. License Frame?

A. I can see that it is.

Q. After you left U. S. License Frame, or at the time you left them, the order was not filled, was it?

A. No, it wasn't.

Q. And you subsequently filled the last portion of it with frames, of which this Exhibit 2 was one, did you not?

A. I did.

Q. I believe you arranged the cancellation of the balance of the U. S. License Frame order, did you not?

A. I did not. I arranged the cancellation of it, not [228] from Eddie Nelson, but from myself. The order was placed by me to U. S., and I definitely cancelled it out in March, I believe—I have a copy of the letter—but it was in March of 1953. I wrote them a letter telling them not to manufacture or send any other frames to Eddie Nelson.

Q. I can't hear you.

A. I sent a letter cancelling the balance of the order to myself to be delivered to——

The Court: He said he wrote them a letter in March, 1953, not to manufacture or deliver any more frames to Eddie Nelson.

Q. (By Mr. Fulwider): You knew, however,

(Testimony of Robert W. Brown.)

that pursuant to that order taken by you when you were working with them, they had made up this die, and I think the order was for 1,000 frames, and that the order had not been completely delivered, did you not?

A. I certainly did. I also was very aware that the contract had been violated to where it was no longer valid.

Q. Did you subsequently supply any more license frames to Exhibit 2 to Eddie Nelson?

A. In June, 1953, I delivered him 500 pairs.

Q. What was your source of supply for that 500 that you delivered to Mr. Nelson in June of 1953?

A. I manufactured them myself.

Q. You say you manufactured them. Did you then have [229] die casting equipment?

A. Well, no, I caused them to be manufactured, we will say. I had my dies cast by Monarch Die Casting.

Q. That is, first you had a die made by the gentleman who was in here the other day, Mr. Webb?

A. That is right.

Q. What did you take to Mr. Webb for him to use—by the way, Mr. Webb at that time had made the dies for the U. S. License Frame Eddie Nelson, had he not? A. I have no idea.

Q. You don't know? A. No.

Q. You did know, though, that he had made dies for U. S. License Frame? A. I did not.

Q. You went to Mr. Webb and what did you take to him?

(Testimony of Robert W. Brown.)

A. What do you mean, what did I take to him?

Q. I mean, you wanted him to make a die for you. Did you just draw it out for him or did you describe it with gestures or what?

The Court: Or did you take one of those plates?

The Witness: No, I did not. I took him exactly what I wanted. I drew the drawing myself on a piece of paper exactly like this, and there is no comparison at all between this and U. S. License Frame other than it has got a line at the bottom [230] and a line at the top. I designed the back of it with a reinforcement beam; I also designed it the way it comes down here and up here (indicating) with a smooth angle instead of having it rough.

I designed the entire thing myself and told him exactly what I wanted, and Mr. Webb made it that way. In fact, it is a close copy, we will say, of Angelus Die Casting.

Q. Does Angelus Die Casting still make frames?

A. They certainly do.

Q. Also you used Angelus Die Casting frame as a pattern then?

A. I would say I used it closer than anybody's.

Q. How about one of the Benmatt frames?

A. And it was one of the Benmatt frames that I liked very much.

Q. Who are the Monarch Casting frames sold to, I mean they don't sell to the trade? A. No.

Q. Do they sell to many dealers or just to one outlet? A. Monarch?

(Testimony of Robert W. Brown.)

Q. Yes.

A. Monarch is a jobber casting company. They just do casting job work only.

Q. For anybody that wants it?

A. That is right. [231]

Q. So after you had the die made by Mr. Webb you took that to Monarch? A. Yes.

Q. And they cast the frames for you?

A. That is right.

Q. Did they plate them? A. No.

Q. Who plated them?

A. C. & W. Metal Finishers, Precision Metal Finishers, Custom, Industrial.

The Court: That first 500?

The Witness: No, the first 500 I believe was plated, or this particular 500 you mean?

The Court: Yes.

The Witness: I believe it was plated at C. & W. Metal Finishers.

The Court: How about the paint, do you call that plating?

The Witness: No, the paint we did, my wife and I did it ourselves.

Q. (By Mr. Fulwider): Did you do anything else on the frame other than the paint and packing?

A. Yes, we did. We cleaned them and drilled the holes to clear them, took all the flash off of them and delivered [232] them up to have them polished and plated.

(Testimony of Robert W. Brown.)

Q. And delivered them to Eddie Nelson?

A. Then they were delivered to Eddie Nelson.

Q. Was that your same procedure as to the other orders which you were taking at about that time? A. Yes.

Q. When did you start having Monarch—first let me ask you this: When was the die made for you by Mr. Webb for the Eddie Nelson frame?

A. Between Christmas and New Year's. Merle Brown and I went up to him and asked him if he would make us a die.

The Court: What year?

The Witness: 1952.

Q. (By Mr. Fulwider): Subsequently you had the frames made by Monarch?

A. That is right.

Q. Did you have Mr. Webb make for you any other dies? A. Mr. Webb has made all my dies.

The Court: You still use the same master die with inserts for the name?

The Witness: My master die is made of a different type than anybody else's. I can adapt any state or any type of license frame, so I don't think it would be physically impossible to cast anything but a frame with a master die, unless you went to a terrific expense, but my dies are made with a [233] large insert plate, such as we brought here yesterday, and it is quite different than anybody else's in the business.

The Court: You can insert the top, bottom or ends?

(Testimony of Robert W. Brown.)

The Witness: I can, yes. And my different styles other than this one today are all one piece. I have a large insert and I put the small name insert in the style itself. As you can see here, there is no parting lines, no break, nothing in back or front. This is all one die and we set the inserts inside of it.

The Court: Just the name?

The Witness: Just the name.

The Court: That was the insert you used here that was here yesterday on that die?

The Witness: That is right. We have no headers.

Q. (By Mr. Fulwider): Was the Eddie Nelson order the first one that you supplied after you started your own manufacturing?

A. No, it wasn't. In fact, we started—actually our first order was San Pedro Motors in San Pedro.

Q. When was that?

A. It was in April of 1953.

Q. Now, I believe you said that there were—

The Court: Well, the Eddie Nelson frame, the completion of that original order, was the first one you delivered?

The Witness: No, sir. [234]

The Court: As I understood it, you got an order from him and gave an order to the plaintiff here and you had a parting of the ways before the order was completed, then you had the die made and completed the order. Do I understand you correctly?

(Testimony of Robert W. Brown.)

The Witness: It is partially a misunderstanding.

At that time that I cancelled out and they, for some reason, didn't go ahead and manufacture those, better than 10,000 pair of frames ordered with U. S. that they cancelled all the rest of them out, but they didn't cancel the Eddie Nelson out, and they went ahead and manufactured it after I had given them directions not to.

The Court: They completed the Eddie Nelson order, then?

A. Yes, they completed it, but six months later.

The Court: Then you in June of 1953 also made and delivered some license frames to Eddie Nelson?

The Witness: That is true.

The Court: All right. Then before you had done that you had in the meanwhile made a license frame for San Pedro Motors?

The Witness: I had made it and it was in as much production as I could possibly get polished and delivered. I was delivering all over the state. We had been working day and night completing orders and delivering orders that we had. [235]

Q. (By Mr. Fulwider): That was continuously through that period in early 1953?

A. That is right.

Q. Do I understand you correctly that you cancelled, or had cancelled, all of the orders that had been given or gotten for U. S. License Frame by you while you were with them?

(Testimony of Robert W. Brown.)

A. I didn't get any orders for U. S. but I cancelled out every order that I had given them.

The Court: But Eddie Nelson was the only one that they finished?

The Witness: That is right.

Q. (By Mr. Fulwider): Did you cancel it out by a letter?

A. I cancelled out by letter and I cancelled out verbally.

Q. Do you have a copy of that letter with you?

A. I believe it is here in the files. [236]

* * *

Q. Just one more question. I believe you stated a minute ago that there were numerous differences between Exhibits 2 and 3. Would you point them out to the Court? A. Yes, I believe I can.

My frame, as you see it, goes straight across here and it has a long tapered angle here (indicating). There it comes up straight. Where it goes over it has a radius here (indicating). Also there is a sharp radius here, a sharp radius there, and mine is a longer radius and it again is longer in here (indicating). The frame is heavier in weight, it is reinforced on the back, and it is as far away as you can make it, but you have only one thing to work from, which is a California license plate, and you must put the holes in the same place and the same sizes are standard throughout the business. Where you want to interchange insert dies with other companies, as they commonly do, you must

(Testimony of Robert W. Brown.)

have the same size dies. So I had those made. But this die I believe is a different size than theirs. [237]

As far as being exactly the same, I say it would be much closer to Benmatt and to Angelus because those are the two frames that I—well, it was one of each—I took some from one of them and some from the other and some from my own ideas and put them together. [238]

* * *

The Clerk: Defendants' Exhibit P.

(The document referred to was marked Defendants' Exhibit P for identification.)

Cross-Examination

By Mr. Young:

Q. I show you Defendants' Exhibit P and ask you if you can identify that letter?

A. Yes, I can.

Q. Did you write that letter?

A. Yes, I did.

Q. Did you write it to the person whose name it is addressed to? A. Yes, I did.

The Court: On or about the date it bears?

The Witness: Approximately that date, sir.

The Court: Did you send it?

The Witness: Yes, I did.

The Court: How?

The Witness: By common carrier, mail.

(Testimony of Robert W. Brown.)

Q. (By Mr. Young): Did you have any reply to that letter? A. No, I did not. [241]

* * *

The Court: Very well.

It would seem to me from the plaintiff's point of view that the first question is whether or not Section 102, Subdivision (b), acts as a bar to the validity of your patent:

"A person shall be entitled to patent unless the invention was in public use or on sale in this country more than one year prior to the date of the application for patent in the United States."

Which, in turn, involves the question as to whether or not the Minneapolis plates are of sufficient similarity to be able to say that it is the invention. [247]

* * *

Mr. Fulwider: Yes.

The Court: I do not think any of the prior patents are close enough here to be a publication.

Mr. Fulwider: That was my feeling, and as long as we are in agreement on that, then I can forget the discussion of those.

The Court: I think the first hump is whether or not those plates made and sold in Minneapolis are near enough like your plate to be able to say that the invention was sold more than a year ago.

Under the evidence, I do not think there is any doubt but what there is a question of fact that the sales were made more than a year prior to the ap-

plication. The application was made February 14, 1949, and the first sales under the evidence were made in Minneapolis in December, 1947, so that is more than one year.

So we will reduce it down now to the question of similarity. [248]

* * *

The Court: On the matter of a design patent, I am off-hand, for one who is not an artist like Sir Joshua Reynolds, paintings look alike to me and they look different to others, and all license holders look alike to me but I suppose somebody who is an expert and an artist may see some distinction in a design, and it is not the utility, if I understand the law correctly.

Mr. Fulwider: That is right. It is strictly appearance.

The Court: It is not the ease of manufacture, it is not the convenience, it is just a matter of whether or not it is in the view of someone good-looking and different-looking. [251]

* * *

The Court: Of course, Counsel, in the matter of the design patents I suppose that they receive their greatest use in the design of clothing.

Mr. Fulwider: No, your Honor, really not. There are many clothing patents. On the other hand, if you look at [262] the Gazette week by week, I would say——

The Court: When I say “greatest use” I mean the one that is the most striking and that people think about the most.

Mr. Fulwider: Yes, that is true.

The Court: For instance, the design of a woman's dress, if it can be patented.

Mr. Fulwider: Or like stockings.

The Court: I mean the ordinary person looking at it, you or I, might not see any difference, but it may have some feature about it that is distinctly attractive to that section of the public who would buy it.

On patented flowers there has gotten to be a very fine shade of the line drawn between one rose, a pink rose, and another pink rose, and yet the patents are granted and they are good. [263]

* * *

The point I am making is that the eye or the ordinary observer, not the expert, that these license plate frames look the same to people who are ordinary observers, that that is the test.

The Court: I would say in answer to that, then, that assuming that I am an ordinary observer, this Exhibit 3 does not look the same as any one of the license frames shown on [269] Exhibit A-1 which were sold more than a year prior.

* * *

I submit there is no invention in this patent in suit.

The Court: Well, I do not know whether this "flash of genius" is still the law or not. If it is, then no patent is good and there would be no need for patent lawyers. [274]

Mr. Fulwider: I believe Judge Stephens in a case last year said that if the "flash of genius" rule

has not been emasculated by the decisions, it was certainly overruled by the new statute.

The Court: I think it is by the new statute.

Mr. Young: But nevertheless the degree of difference required to establish novelty is one that they say takes invention, the same as is necessary to establish any mechanical case. The requirement of invention is no less in a design case than in a mechanical case. Here I think that necessary invention has not been shown. You simply have a 2-line frame of a particular stock.

The Court: I am sorry, counsel, but I cannot agree with you. I think it has.

The patent is good, and I think that it is infringed by the one plate made by the defendant, and that is what I call the Eddie Nelson plate, Exhibit 2.

On the matter of the accounting, do you want to refer this to a master, or shall I defer that? [275]

* * *

[Endorsed]: Filed April 30, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 44, inclusive, contain the original

Complaint;

Answer;

Substitution of Attorneys;

Motion and Order for Substitution of Parties;

Findings of Fact & Conclusions of Law;

Judgment;

Notice of Appeal;

Concise Statement of Points on Appeal;

Defendants-Appellants' Designation of Portion of Record on Appeal;

Plaintiff-Appellee's Counter-Designation of Record on Appeal;

which, together with a full, true and correct copy of Notice of Entry of Judgment; and Plaintiff's Exhibits 1, 2, 2A, 3, 3A, 4, 4A, 5, 6, 7, and defendants' Exhibits B, C, D, E, F, F-1, G, G-1, G-2, G-3, H, I, J, J-1, K, L, M, N, O-1, O-2, O-3, & P, and 1 volume of reporter's transcript constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, all in the above-entitled case.

I further certify that my fees for preparing the

foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 14th day of May, 1956.

[Seal] JOHN A. CHILDERS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15128. United States Court of Appeals for the Ninth Circuit. Robert W. Brown & Co., Inc., Robert W. Brown and Olive W. Brown, Appellants, vs. Leonard DeBell (Substituted for United States License Frame Mfg. Co.), Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 15, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15128

LEONARD DeBELL (Substituted for U. S. License
Frame Mfg. Co.),

Appellee,

vs.

ROBERT W. BROWN & CO., INC., ROBERT W.
BROWN and OLIVE W. BROWN,

Appellants.

APPELLANTS' STATEMENT
OF POINTS

Point I.

The Court erred in holding that United States Letters Patent No. D-167,878 in suit is good and valid in law.

Point II.

The Court erred in holding that appellants have infringed said patent by manufacturing and selling license frames exemplified by Exhibit 2.

Point III.

The Court erred in holding that appellee is entitled to judgment for a permanent injunction and an accounting with costs.

Point IV.

The Court erred in holding that license frames embodying the design of the patent in suit were

substantially copied by numerous competitors in the field.

Point V.

The Court erred in holding that the over-all appearance of the design of the patent in suit results in a new and ornamental design when viewed by the ordinary observer.

Point VI.

The Court erred in holding that the license frames exemplified by Exhibit 2 are substantially identical with the design of the patent in suit, Exhibit 1.

Point VII.

The Court erred in finding that the file wrapper references to Watts, Griffith and Overton, Exhibits G-1, G-2 and G-3, respectively, do not anticipate or negative invention of the patent in suit.

Point VIII.

The Court erred in finding that the Patent Office Examiner did not err in allowing and issuing said patent.

Point IX.

The Court erred in finding that the catalog Exhibit J and the Orestor and McRuer patents, Exhibits M and N, were not as relevant as the reference patents located by the Patent Office Examiner and in no way disturb the validity of the patent in suit.

Point X.

The Court erred in ruling that the date on Exhibit A-3 was obviously changed from 1949 to 1947.

Point XI.

The Court erred in finding that the license frames made and sold by The Douglas Co., Exhibits A-1, A-5, and A-15, did not anticipate the design of the patent in suit.

Point XII.

The Court erred in finding that The Douglas Co. license frame, Exhibit A-1, is in all material respects a substantial duplicate of the frames shown in the Watts patent, Exhibit G-1.

Point XIII.

The Court erred in finding that the patent in suit demonstrates novelty and invention over The Douglas Co., frame, Exhibit A-1.

Point XIV.

The Court erred in finding that The Douglas Co. license frames, Exhibits A-1, A-10, and A-15, are in all material respects the same as the frames illustrated in the file wrapper reference patents, Exhibits G-3 and G-2.

Point XV.

The Court erred in holding that the manufacture and sale of license frames Exhibits C, D, and K prior to the invention of the patent in suit is not convincing.

Point XVI.

The Court erred in holding that the evidence as to the use of two cavity master dies before the patent in suit to make frames similar to Exhibits C, D, and K is neither convincing nor persuasive.

Point XVII.

The Court erred in its failure to find that the design of the patent in suit failed to exhibit any inventive quality over the following prior art:

(1) The catalog reference Exhibit J of the Western Auto Supply Co.

(2) The license plate frames Exhibits C, D, and K.

- (3) (a) Orester, et al., Pat. No. 1,787,545 (1931);
(b) McRuer, et al., Pat. No. 1,451,621 (1923);
(c) Gazan, Jr., Pat. No. 167,885 (1952);
(d) Griffith Pat. No. Des. 134,835 (1943);
(e) Watts Pat. No. 1,536,414 (1925);
(f) Overton Pat. No. 1,660,575 (1928).

Point XVIII.

The Court erred in failing to find that the appellants have not made, sold or used anything inventive which is embodied in the design of the patent in suit.

Dated this 10th day of May, 1956.

Respectfully submitted,

LYON & LYON,

JOHN B. YOUNG,

By /s/ JOHN B. YOUNG,

Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed May 11, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the parties through their respective counsel that the following patents shall comprise a book of exhibits of which ten (10) appropriate copies shall be made for use of the Court and counsel:

Griffith	D-134,835
Gazan	D-167,885
McRuer	1,451,621
Watts	1,536,414
Orester	1,787,545
Overton	1,660,575

Dated: July 17, 1956.

LYON & LYON,

By /s/ ROLAND N. SMITH,
Attorneys for Appellants.

Dated: July 18, 1956.

FULWIDER, MATTINGLY &
HUNTLEY,

By /s/ ROBERT FULWIDER,
Attorneys for Appellee.

[Endorsed]: Filed July 23, 1956.

No. 15128

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT W. BROWN & Co., Inc., ROBERT W. BROWN and
OLIVE W. BROWN,

Appellants,

vs.

LEONARD DE BELL (substituted for U. S. License Frame
Mfg. Co.),

Appellee.

BRIEF FOR APPELLANTS.

LEON & LYON,

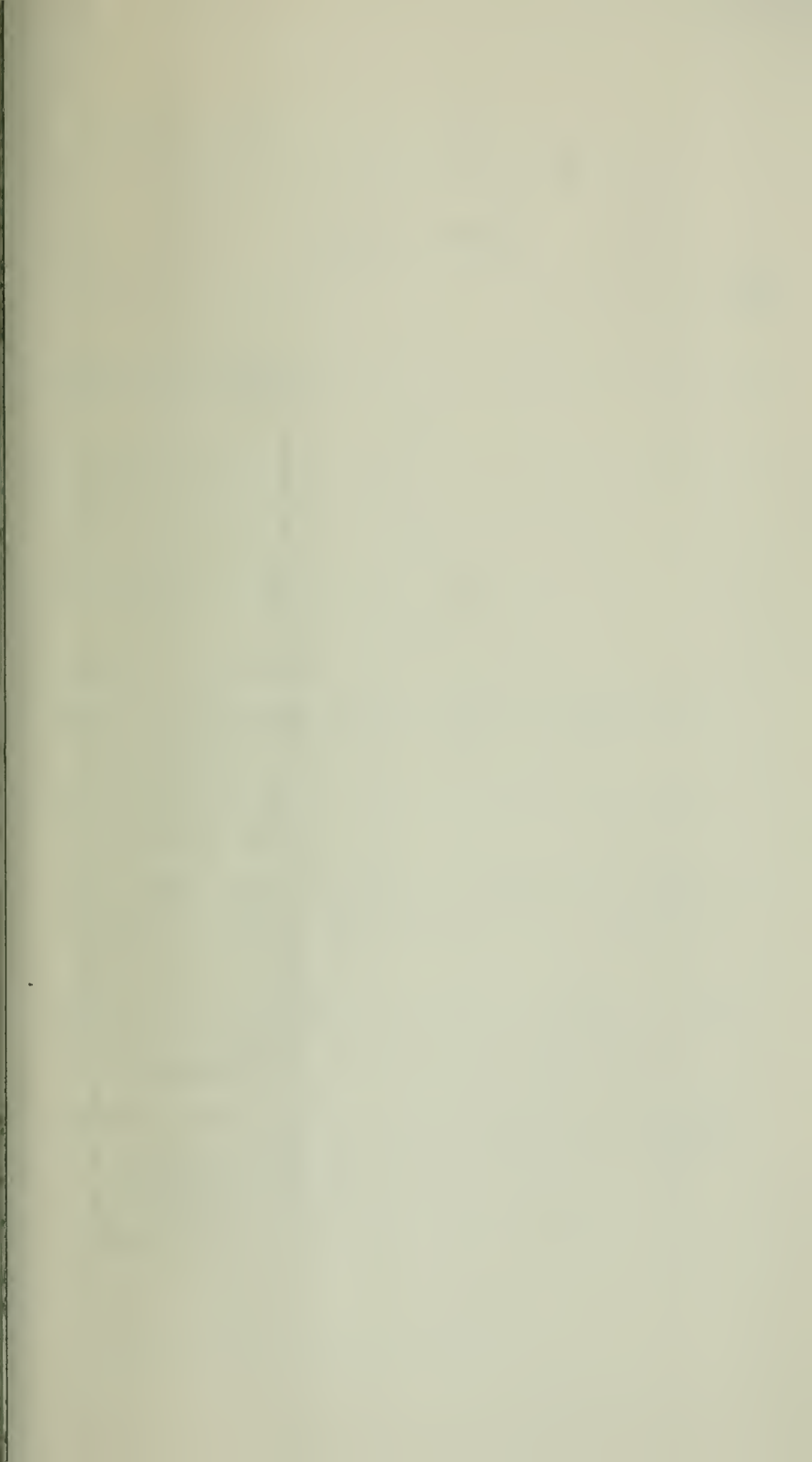
811 West Seventh Street,
Los Angeles 17, California.

Attorneys for Appellants.

FILE

1938-39

PAGE 10



TOPICAL INDEX

	PAGE
I.	
Jurisdictional statement	1
II.	
Statement of the case.....	1
III.	
Specification of errors.....	3
IV.	
Summary of argument.....	5
Point One. Defendants-appellants have not appropriated anything patentable from plaintiff's patented design.....	6
Point Two. The patent in suit is invalid since it involves no invention over the prior art.....	7
Point Three. The presumption of validity of the patent is seriously weakened because pertinent prior art was not considered by the Patent Office.....	9
Point Four. The standard of invention required for design patents is the same as that for mechanical patents; there must be originality in the exercise of the inventive faculty.....	11
Point Five. The similarity of goods of plaintiff and defendants is not involved in this appeal; the count for unfair competition was dismissed at the trial.....	15
Conclusion	15

TABLE OF AUTHORITIES CITED

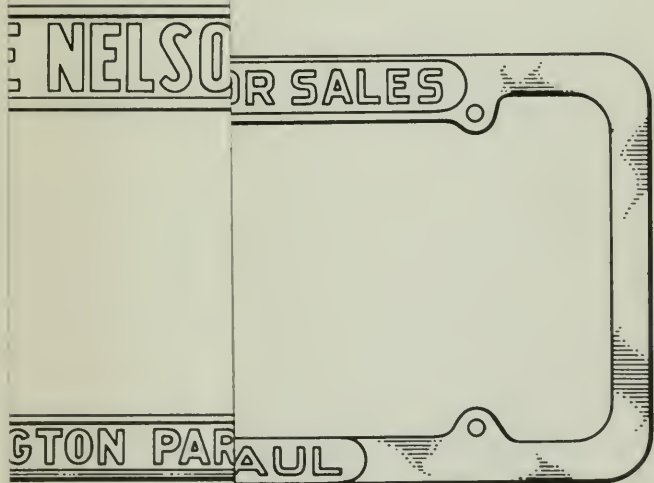
CASES	PAGE
General Electric Co. v. Parr Electric Co., 98 F. 2d 60.....	11, 13
Gomez et al. v. Granat Bros., et al., 177 F. 2d 266.....	9
Jacuzzi Bros. Inc. v. Berkeley Pump Co., 191 F. 2d 632.....	10
King Gun Sight Company v. Micro Sight Company, 218 F. 2d 825	9
Koch Mfg. Co. v. Blue Star Auto Stores, Inc., 103 F. 2d 598....	11, 14
Lane Wells Co. v. M. O. Johnston Oil Field Service Corp., 181 F. 2d 707.....	10
Magarian v. Detroit Products Co., 128 F. 2d 544.....	11
McClintock v. Gleason, 94 F. 2d 115.....	10
Mettler v. Peabody Engineering Corp., 77 F. 2d 56.....	10
Norman Products Co. v. Sequoia Mfg. Co., 107 Fed. Supp. 928..	10
Spirit et al. v. J. F. D. Manufacturing Co., Inc., 132 Fed. Supp. 424	11, 14
Stoddy v. Mills Alloys, 67 F. 2d 807.....	10
Thabet Manufacturing Co. v. Kool Vent Metal Awning Cor- poration of America, 226 F. 2d 207.....	11, 12
Trojan Textile Corp. v. Crown Fabrics Corp., 110 U. S. P. Q. 231	11, 14
Western Auto Supply Co. v. American National Co., 114 F. 2d 711	11, 12
Whiteman v. Mathews, 216 F. 2d 712.....	8

STATUTES

United States Code, Title 28, Sec. 1291	1
United States Code, Title 28, Sec. 1338(a).....	1
United States Code, Title 28, Sec. 1400(b).....	1



TENT 167,878 (STERN AUTO)
'S EXHIBIT 'KHIBIT "J-1"



DEVICE (GLAS COMPANY)
'S EXHIBIT "IBIT "A-1"

als

and

s,

ame

s.

riect
Des.
the
nia,
C.
291

No.
bes-
hts

TABLE OF AUTHORITIES CITED

CASES	PAGE
General Electric Co. v. Parr Electric Co., 98 F. 2d 60.....	11, 13
Gomez et al. v. Granat Bros., et al., 177 F. 2d 266.....	9
Jacuzzi Bros. Inc. v. Berkeley Pump Co., 191 F. 2d 632.....	10
King Gun Sight Company v. Micro Sight Company, 218 F. 2d 825	9
Koch Mfg. Co. v. Blue Star Auto Stores, Inc., 103 F. 2d 598....	11, 14
Lane Wells Co. v. M. O. Johnston Oil Field Service Corp., 181 F. 2d 707.....	10
Magarian v. Detroit Products Co., 128 F. 2d 544.....	11
McClintock v. Gleason, 94 F. 2d 115.....	10
Mettler v. Peabody Engineering Corp., 77 F. 2d 56.....	10
Norman Products Co. v. Sequoia Mfg. Co., 107 Fed. Supp. 928..	10
Spirt et al. v. J. F. D. Manufacturing Co., Inc., 132 Fed. Supp. 424	11, 14
Stoddy v. Mills Alloys, 67 F. 2d 807.....	10
Thabet Manufacturing Co. v. Kool Vent Metal Awning Cor- poration of America, 226 F. 2d 207.....	11, 12
Trojan Textile Corp. v. Crown Fabrics Corp., 110 U. S. P. Q. 231	11, 14
Western Auto Supply Co. v. American National Co., 114 F. 2d 711	11, 12
Whiteman v. Mathews, 216 F. 2d 712.....	8

STATUTES

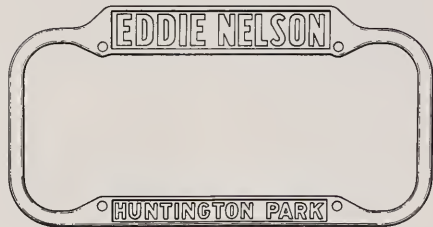
United States Code, Title 28, Sec. 1291	1
United States Code, Title 28, Sec. 1338(a).....	1
United States Code, Title 28, Sec. 1400(b).....	1



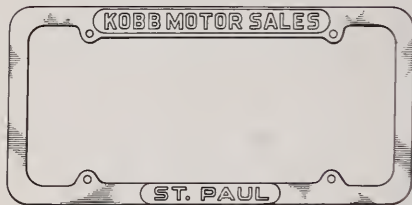
BESSOLO DESIGN PATENT 167,878, IN SUIT
PLAINTIFF'S EXHIBIT "1"



PRIOR ART (WESTERN AUTO)
DEFENDANTS' EXHIBIT "J-1"



ACCUSED DEVICE
PLAINTIFF'S EXHIBIT "2"



PRIOR ART (DOUGLAS COMPANY)
DEFENDANTS' EXHIBIT "A-1"

No. 15128

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT W. BROWN & Co., Inc., ROBERT W. BROWN and
OLIVE W. BROWN,

Appellants,

vs.

LEONARD DE BELL (substituted for U. S. License Frame
Mfg. Co.),

Appellees.

BRIEF FOR APPELLANTS.

I.

Jurisdictional Statement.

This is an appeal from the judgment of the District Court (Hall, D. J.) holding plaintiff's Patent No. Des. 167,878 valid and infringed. The District Court of the United States for the Southern District of California, Central Division, has jurisdiction under 28 U. S. C. 1338(a) and 1400(b). Title 28 U. S. C. Section 1291 gives this Court jurisdiction of this appeal.

II.

Statement of the Case.

This is a suit for infringement of Letters Patent No. Des. 167,878 granted October 7, 1952 to Joseph C. Bessolo for license plate holder. Bessolo assigned the rights

to said patent to the original plaintiff, U. S. License Frame Mfg. Co., and before the trial Leonard De Bell was substituted as Plaintiff.

Defendant Robert W. Brown & Co. Inc. is a California corporation. The individual defendants Robert W. Brown and Olive W. Brown are husband and wife, and president and secretary, respectively, of the corporation. The corporation manufactures and sells die cast license plate frames. Prior to incorporation in July, 1953, the individual defendant Robert W. Brown obtained an order for license plate frames from an automobile dealer named Eddie Nelson, and Brown in turn placed the order with U. S. License Frame Mfg. Co. [R. 158]. That company, formerly plaintiff in this action, began deliveries [Ex. 3] under the order, but upon its failure to meet the delivery schedule Brown cancelled the order by letter [Ex. "P"] and proceeded to complete the order himself [R. 160]. He had a die constructed and employed another concern, Monarch Die Casting, to manufacture the license plate frames [Ex. 2] for him, and in this way he delivered the balance of the order to Eddie Nelson. The court below found that these license frames [Ex. 2] infringed the Bessolo design patent in suit.

The complaint contained a count for Unfair Competition [R. 6] but that was dismissed at the trial with consent of plaintiff, and it is not involved in this appeal.

In brief, the questions for determination here are:

- (1) Does the Bessolo design patent in suit embody any invention over the prior art?, and
- (2) Does the accused device contain that invention?

III.

Specification of Errors.

The following errors are specified as those which will be urged in support of this appeal:

I. The Court erred in holding that United States Letters Patent No. D-167,878 in suit is good and valid in law.

II. The Court erred in holding that appellants have infringed said patent by manufacturing and selling license frames exemplified by Exhibit 2.

III. The Court erred in holding that appellee is entitled to judgment for a permanent injunction and an accounting with costs.

IV. The Court erred in holding that license frames embodying the design of the patent in suit were substantially copied by numerous competitors in the field.

V. The Court erred in holding that the over-all appearance of the design of the patent in suit results in a new and ornamental design when viewed by the ordinary observer.

VI. The Court erred in holding that the license frames exemplified by Exhibit 2 are substantially identical with the design of the patent in suit, Exhibit 1.

VII. The Court erred in finding that the file wrapper references to Watts, Griffith and Overton, Exhibits G-1, G-2 and G-3, respectively, do not anticipate or negative invention of the patent in suit.

VIII. The Court erred in finding that the Patent Office Examiner did not err in allowing and issuing said patent.

IX. The Court erred in finding that the catalog Exhibit J and the Orester and McRuer patents, Exhibits M and N, were not as relevant as the reference patents located by the Patent Office Examiner and in no way disturb the validity of the patent in suit.

X. The Court erred in ruling that the date on Exhibit A-3 was obviously changed from 1949 to 1947.

XI. The Court erred in finding that the license frames made and sold by The Douglas Co., Exhibits A-1, A-5, and A-15, did not anticipate the design of the patent in suit.

XII. The Court erred in finding that The Douglas Co. license frame, Exhibit A-1, is in all material respects a substantial duplicate of the frames shown in the Watts patent, Exhibit G-1.

XIII. The Court erred in finding that the patent in suit demonstrates novelty and invention over The Douglas Co. frame, Exhibit A-1.

XIV. The Court erred in finding that The Douglas Co. license frames, Exhibits A-1, A-10 and A-15, are in all material respects the same as the frames illustrated in the file wrapper reference patents, Exhibits G-3 and G-2.

XV. The Court erred in holding that the manufacture and sale of license frames Exhibits C, D and K prior to the invention of the patent in suit is not convincing.

XVI. The Court erred in holding that the evidence as to the use of two cavity master dies before the patent in suit to make frames similar to Exhibits C, D and K is neither convincing nor persuasive.

XVII. The Court erred in its failure to find that the design of the patent in suit failed to exhibit any inventive quality over the following prior art:

- (1) The catalog reference Exhibit J of the Western Auto Supply Co.
- (2) The license plate frames Exhibits C, D and K.
- (3) (a) Orester, *et al.*, Pat. No. 1,787,545 (1931);
(b) McRuer, *et al.*, Pat. No. 1,451,621 (1923);
(c) Gazan, Jr., Pat. No. Des. 167,885 (1952);
(d) Griffith, Pat. No. Des. 134,835 (1943);
(e) Watts, Pat. No. 1,536,414 (1925);
(f) Overton, Pat. No. 1,660,575 (1928).

XVIII. The Court erred in failing to find that the appellants have not made, sold or used anything inventive which is embodied in the design of the patent in suit.

XIX. The Court erred in concluding that final judgment should be entered in favor of the plaintiff with costs and disbursements and in entering such a judgment.

IV.

Summary of Argument.

1. Defendants-Appellants have not appropriated anything patentable from plaintiff's patented design.
2. The patent in suit is invalid since it involves no invention over the prior art.
3. The presumption of validity of the patent is seriously weakened because pertinent prior art was not considered by the Patent Office.
4. The standard of invention required for design patents is the same as that for mechanical patents; there must be originality in the exercise of the inventive faculty.
5. The similarity of goods of plaintiff and defendants is not involved in this appeal; the Count for Unfair Competition was dismissed at the trial.

POINT ONE.

Defendants-Appellants Have Not Appropriated Anything Patentable From Plaintiff's Patented Design.

The design of the patent in suit is primarily functional since the principal feature comprises the advertising material set forth in bold face letters. Furthermore, the design is merely utilitarian since the sole purpose is to provide advertising space on the upper and lower parts of the generally rectangular frame. The drawing attached to this brief shows the design of the patent in suit [Ex. 1] as compared to the design of the accused device [Ex. 2]. Also depicted in the drawing are the prior art designs of Western Auto Supply Co. [Ex. J-1] and The Douglas Company design [Ex. A-1]. It will be observed from the drawing that the design of the accused device is no closer to the design of the patent in suit than it is to the design of the prior art. The Western Auto frame [Ex. J-1] shows an enlarged advertising space on the top bar of the frame, and The Douglas frame [Ex. A-1] shows advertising matter on both the upper and lower bars of the frame. If the design of the patent in suit could be construed as involving any invention, clearly that invention is not present in the accused device, as shown by the drawing. Except for the advertising space and the particular advertising matter displayed, all four designs on the drawing are similar.

POINT TWO.

The Patent in Suit Is Invalid Since It Involves No Invention Over the Prior Art.

The attached drawing shows that there is no real difference of an inventive nature between the prior art and the design of the patent in suit. The frames are rectangular since they must encompass a rectangular license plate and the frames have similar open areas in the center to expose the lettering on the license plate. The dominating features of the various designs reside in the advertising space and advertising matter which is purely functional and utilitarian.

Moreover, the prior art designs shown on the attached drawing were not considered by the Patent Office before granting the Bessolo patent in suit. The same is true of the Orestes *et al.* Patent No. 1,787,545 [Ex. M] and McRuer Patent 1,451,621 [Ex. N]. Indeed the Patent Office Examiner was unable to locate any reference patents showing a "two line frame", that is, a license plate frame having advertising spaces both on the upper and lower bars.

In the argument advanced by Bessolo's counsel which resulted in allowance of the Bessolo application for patent, it was stated:

"the lower indicia surface is almost double the width of the upper indicia surface so that the lower surface indicia may be emphasized over the upper indicia." [Ex. G, pp. 7-8.]

It will be noted that the accused device does not have this feature which Bessolo's counsel argued before the Patent Office. Thus, the lower indicia surface of the accused device is smaller rather than larger as compared to the upper indicia surface.

That The Douglas Company Frame [Ex. A-1] was considered by plaintiff to be similar to the design of the Bessolo patent in suit shown by the fact that plaintiff's counsel sent a letter to The Douglas Company [Ex. B] charging that The Douglas Company license plate frame infringed the Bessolo patent in suit. It is clear from a consideration of the testimony of defendants' witnesses Huckelbury, Lenk, Sorenson and Bell that license plate frames having two lines of advertising indicia were manufactured and sold in the United States more than one year prior to the filing date of the Bessolo patent D-167,878 in suit, that is, more than one year prior to May 10, 1948. Thus, Huckelbury, in referring to Exhibit C testified that his company, The Benmatt Organization, made frames "just exactly like that in 1938" [R. 34]. Lenk testified that his company, Ace Stamp and Stencil Company made dies for frames like Exhibit C in 1940 [R. 47]. Sorenson testified that his company, Angelus Die Casting Company, made frames like Exhibit D in September, 1948 [R. 78]. Bell testified that his company, Shehan Manufacturing Company, made two-line frames prior to 1943 [R. 71].

That the testimony of these four disinterested witnesses is not to be disregarded is clear from the following 9th Circuit decisions:

In *Whiteman v. Mathews*, 216 F. 2d 712 (1954), at page 716, appears this statement:

"The burden of proof imposed upon a party tendering the issue of prior public use is a heavy one. It is not satisfied by a mere preponderance of the evidence, but is borne successfully only if the evidence is clear and satisfactory—perhaps beyond a reasonable doubt. *It is not the rule, however, that oral evidence is insufficient as a matter of law in all cases;*

nor does the rule require the trial court to discard credible testimony merely because it is oral and because it deals with events and circumstances long past. If the evidence as to prior public use is such that it would be accepted as satisfactory and convincing in any other kind of case, criminal or civil, then the degree of proof fixed by law to establish such use is attained. *Radio Corp. of America v. Radio Engineering Laboratories*, 293 U. S. 1, 7, 55 S. Ct. 928, 931, 79 L. Ed. 163; *Paraffine Companies, Inc. v. McEverlast, Inc.*, 9 Cir., 84 F. 2d 335, 339; *Rown v. Brake Testing Equipment Corp.*, 9 Cir., 38 F. 2d 220, 224; *International Carbonic Engineering Co. v. Natural Carbonic Products, Inc.*, D. C. Cal., 57 F. Supp. 248, 258, affirmed 9 Cir., 158 F. 2d 285; *Becker v. Electric Service Supplies Co.*, 7 Cir., 98 F. 2d 366.” (Emphasis added.)

King Gun Sight Company v. Micro Sight Company, 218 F. 2d 825 (1955), at page 827, is the statement:

“Oral testimony, if of sufficient reliability and cogency, is as effective as written or other demonstrative evidence to establish the invalidity of patents due to prior art. (Citing Whiteman v. Mathews, supra.)” (Emphasis added.)

POINT THREE.

The Presumption of Validity of the Patent Is Seriously Weakened Because Pertinent Prior Art Was Not Considered by the Patent Office.

As set forth in the Ninth Circuit case of *Gomez et al. v. Granat Bros., et al.*, 177 F. 2d 266 (1949):

“The presumption of *prima facie* validity of patent is greatly weakened, if not destroyed, when pertinent prior art is not considered by the Patent Office.”

The trial court had found the patent valid but this was reversed on appeal. The following supporting cases were cited in the appellate decision:

Stoddy v. Mills Alloys (9th Cir.), 67 F. 2d 807;

Mettler v. Peabody Engineering Corp. (9th Cir.),
77 F. 2d 56;

McClintock v. Gleason (9th Cir.), 94 F. 2d 115.

In *Norman Products Co. v. Sequoia Mfg. Co.*, 107 Fed. Supp. 928, the District Court (N. D. Cal., S. D.) (1952), stated at page 929:

"The presumption of *prima facie* validity which ordinarily attaches to a patent by reason of the issuance by the Patent Office, is dissipated when pertinent prior knowledge and prior art have been omitted from consideration by the Patent Office. *The presumption does not create validity of a patent as against pertinent prior art references which have not been considered.*" (Emphasis added.)

The Court cited:

Lane Wells Co. v. M. O. Johnston Oil Field Service Corp. (9th Cir.), 181 F. 2d 707 (1950);

Jacuzzi Bros. Inc. v. Berkeley Pump Co. (9th Cir.),
191 F. 2d 632 (1951).

The Patent Office did not consider the Western Auto frame nor The Douglas frame as shown on the attached drawing [Exs. J-1 and A-1, respectively] nor did the Patent Office consider the two line frames shown by the Orestor Patent No. 1,787,545 [Ex. M] nor the McRuer Patent No. 1,451,621 [Ex. N]. As a consequence of this failure to consider the most pertinent prior art, the presumption of validity must fail.

POINT FOUR.

The Standard of Invention Required for Design Patents Is the Same as That for Mechanical Patents; There Must Be Originality in the Exercise of the Inventive Faculty.

As set forth in the 9th Circuit case of *Magarian v. Detroit Products Co.*, 128 F. 2d 544 (1942):

“The design of the arm is streamlined and pleasing in appearance; but this is insufficient in the absence of invention.”

In that case, the 9th Circuit Court of Appeals held that Design Patent 109,148 covering a signal arm used on motor trucks and buses was invalid for lack of invention.

The following cases illustrate the strict construction placed on the validity of design patents. In each case the patent was held invalid for non-invention.

Western Auto Supply Co. v. American National Co., 114 F. 2d 711 (C. C. A. 6, 1940);

Koch Mfg. Co. v. Blue Star Auto Stores, Inc., 103 F. 2d 598 (C. C. A. 7, 1939);

General Electric Co. v. Parr Electric Co., 98 F. 2d 60 (C. C. A. 2, 1938);

Thabet Manufacturing Co. v. Kool Vent Metal Awning Corporation of America, 226 F. 2d 207 (C. C. A. 6, 1955);

Trojan Textile Corp. v. Crozen Fabrics Corp., New York District Court decided 7-12-56, 110 U. S. P. Q. 231;

Spirt et al. v. J.F.D. Manufacturing Co., Inc., 132 Fed. Supp. 424 (1955).

In the *Western Auto Supply* case, *supra*, the Court held Design Patent 97,206 for a coaster wagon invalid for lack of invention. The Court said:

“If the variation sought to be patented is of such nature that it would naturally occur to one of average skill in the field, it is in reality in potential possession of the public, and to reward it with the monopoly of a patent would be out of harmony with the purpose and intent of the statute. When the idea is adapted or derived by analogy from prior usage, or when it is embodied in a design resembling the prior art in general appearance or central theme, there is no patentable invention. ‘Mere mechanical skill is insufficient,’ said Brown, J., in *Northrup v. Adams*, 12 Off. Gag. 430. ‘*There must be something akin to genius,—an effort of the brain as well as the hand.*’ The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention.’” (Emphasis added.)

In the *Thabet Manufacturing Co.* case, *supra*, the Court held Design Patent No. 154,550 on a Canopy invalid for lack of invention. The Court said:

“A design patent must disclose inventive originality in design and ornamentation, and *mere mechanical skill is no more sufficient to constitute inventive art in the case of the design artist than in the case of the engineer.* (Citing cases.)

“A design patent must be possessed of novelty; the adaptation of old devices to new purposes, however convenient or useful they may be in their new role, is not invention. *Western Auto Supply Co. v. American-National Co.*, *supra*; *Imperial Glass Co. v. A. H. Heisey & Co.*, 6 Cir., 294 F. 267. The degree of difference required to establish novelty occurs when

the average observer takes the new design for a different, and not a modified already existing design. Application of Johnson, 175 F. 2d 791, 792, 36 C. C. P. A. Patents 1175; Application of Abrams, 205 F. 2d 202, 203, 40 C. C. P. A. Patents 1045. The fact that a design may be distinguished from those found in the prior art does not import the required novelty and ornamentation; its overall aesthetic effect must represent a step which has required *inventive genius* beyond the prior art. Burgess Vibrocrafters v. Atkins Industries, 204 F. 2d 311, 314.” (Emphasis added.)

In the *General Electric* case, *supra*, Design Patent 98,076 for an electric fan was held invalid for lack of invention. The Court said:

“The Gosling patent shows a design which combines wide blades of special shape with the bullet-shaped nose or hub to produce an alleged new attractive design for an electric fan. Under it, the Silver Swan design of appellee is accused of infringement. The accusation is based on similarity of the bullet nose and the wide overlapping blades. The claim reads ‘the ornamental design for an electric fan as shown.’ The wide blades of the Upson patent are borrowed for this design. It required *no inventive thought* to employ the wide blades of Upson and to take the bullet shaped hub from the Noble patent No. 40,570 and draw a design of the combination. There was *no inventive thought* disclosed in this design. Dietz Co. v. Burr & Starkweather Co., 2 Cir., 243 F. 592; Strause Gas Iron Co. v. Wm. M. Crane Co., 2 Cir., 235 F. 126. An artisan with the Noble and Upson patents before him could put the wide blades of the latter on the tapered hub of the former. This patent must be held invalid.” (Emphasis added.)

In the *Koch Mfg. Co.* case, *supra*, Design Patent No. 104,111 for an automobile exhaust hood, it was held invalid for lack of invention. The Court said:

“Validity of a design patent must be backed by some originality, as well as by an eye appeal.”

In the *Trojan Textile* case, *supra*, the Court held a design patent on a Textile Fabric invalid as involving no invention, holding:

“It is clear that the requirement of invention for design patents is as high as it is for mechanical patents, and that the invention must rise sufficiently above the prior art in its uniqueness of composition and its aesthetic appeal as to constitute a true invention. *Blisscraft v. Rona Plastic Corp.*, 123 F. Supp. 552, 102 U. S. P. Q. 211 (S. D. N. Y. 1954), *aff'd* on opinion below, 219 F. 2d 238, 104 U. S. P. Q. 222 (C. A. 2, 1955); *Tourneau v. Tishman & Lipp*, 119 F. Supp. 593, 100 U. S. P. Q. 350 (S. D. N. Y. 1953), *aff'd* on opinion below, 211 F. 2d 240, 100 U. S. P. Q. 334 (C. A. 2, 1954).”

In the *Spirit* case, *supra*, the Court held a design patent on “Rabbit Ears” television antenna invalid as involving no invention, stating:

“I have not overlooked the fact that the Leonard Patent was considered by the Patent Office in the issuance of the plaintiff’s patent, as shown by the file wrapper in evidence. In my opinion the plaintiff’s patent does not meet the test of ‘invention’ necessary to establish validity. It is merely a variation of prior art, the preparation of which did not require uncommon or exceptional inventive skill or talent.”

POINT FIVE.

The Similarity of Goods of Plaintiff and Defendants
Is Not Involved in This Appeal; the Count for
Unfair Competition Was Dismissed at the Trial.

In the Complaint as originally filed there was a count for Unfair Competition based on the similarity of these license plate frames but the count was dismissed at the trial, and plaintiff relied solely upon his patent. The fact that one license plate frame looks like another license plate frame was commented on by the trial judge who said:

“On the matter of a design patent, I am off-hand, for one who is not an artist like Sir Joshua Reynolds, paintings look alike to me and they look different to others, and *all license holders look alike to me* but I suppose somebody who is an expert and an artist may see some distinction in a design, and it is not the utility, if I understand the law correctly.” [R. 169.] (Emphasis ours.)

Furthermore, the trial judge erred by comparing the *goods* of plaintiff with Exhibit 2 sold by defendants, rather than comparing the design of the patent with said Exhibit 2.

Conclusion.

The judgment of the District Court should be reversed.

Respectfully submitted,

LYON & LYON,

By JOHN B. YOUNG,

Attorneys for Appellants.

No. 15,128
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT W. BROWN & Co., INC., ROBERT W. BROWN and
OLIVE W. BROWN,

Appellants,

vs.

LEONARD DeBELL (substituted for U. S. License Frame
Mfg. Co.),

Appellee.

BRIEF FOR APPELLEE.

FULWIDER, MATTINGLY & HUNTLEY,
ROBERT W. FULWIDER and
WILLIAM K. YOUNG,

5225 Wilshire Boulevard,
Los Angeles 36, California,

Attorneys for Appellee.

FILED

NOV 27 1956

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
I.	
Statement of the case.....	1
II.	
Summary of argument.....	3
III.	
Argument.....	5
A. The Bessolo patent is valid as exemplified by the absence of anticipatory art.....	5
B. The commercial success and copying of the design in question by competitors emphasizes the validity of the Bessolo patent	11
C. The law of the subject fully sustains the validity of the Bessolo patent	14
D. The Bessolo patent is clearly infringed by the defendants' license frames	23
E. The law of infringement sustains the judgment of the lower court	26
IV.	
Conclusion	27

TABLE OF AUTHORITIES CITED

CASES	PAGE
Anthonson v. Hedrick, 89 F. 2d 149, 33 U. S. P. Q. 180.....	16
Bourquin, dba Savoy, etc. v. Grandinetti, 43 Fed. Supp. 523, 52 U. S. P. Q. 160.....	21
Columbia Protektosite Co. v. Great American Plastics Co., 112 Fed. Supp. 39, 97 U. S. P. Q. 57.....	20
Dietz, etc. v. Burr, etc., 243 Fed. 592.....	7
Dobson v. Dornan, 118 U. S. 110.....	9, 27
Donaco Plastics v. Tray-Ware, 87 U. S. P. Q. 29.....	20
Falcon Industries, Inc., et al. v. R. S. Herbert Co., Inc., et al., 128 Fed. Supp. 204, 104 U. S. P. Q. 301.....	7, 20
Forestek Plating v. Knapp-Monarch Co., 106 F. 2d 554, 43 U. S. P. Q. 39.....	21, 27
Fouch, dba Universal Microphone v. Associated Projects Co., 79 U. S. P. Q. 259.....	21
Gasifer Mfg. Co. v. General Motors Corp., 138 F. 2d 197, 59 U. S. P. Q. 259.....	16
Glen Raven, etc. v. Sanson, etc., 189 F. 2d 845, 89 U. S. P. Q. 470.....	9, 11, 17, 18, 19, 21, 22, 26
Gomez, et al. v. Granat Bros., et al., 177 F. 2d 266.....	5, 6
Gorham v. White, 80 U. S. 511.....	9, 17, 18, 26
Krieger v. Colby, 106 Fed. Supp. 124, 95 U. S. P. Q. 4.....	20
Laskowitz v. Marie-Designer, Inc., 119 Fed. Supp. 541, 100 U. S. P. Q. 367.....	20
Nebel Knitting Co. v. Sanson Hosiery Mills, Inc., 214 F. 2d 781, 102 U. S. P. Q. 142.....	21
Palmer Company v. Luden's, Inc. 128 Fed. Supp. 672, 104 U. S. P. Q. 246.....	20
R. M. Palmer Company v. Luden's, Inc., 111 U. S. P. Q. 1....	12, 20
Ruth v. Climax Molybdenum Co., 93 F. 2d 699, 36 U. S. P. Q. 128	16

	PAGE
Sanson Hosiery Mills v. Warren Knitting Mills, 202 F. 2d 395, 96 U. S. P. Q. 247.....	20, 21
Sanson Hosiery Mills, Inc., et al. v. H. S. Kress Co., Inc. 109 Fed. Supp. 383, 95 U. S. P. Q. 142.....	22, 26
Sanson Hosiery Mills, et al. v. Warren Knitting Mills, Inc., 95 U. S. P. Q. 138.....	22
Sel-O-Rak Corp. v. Henry Hanger & Display Fixture Corp. of America, et al., 232 F. 2d 176, 109 U. S. P. Q. 179.....	9
Standard Match Corp. v. Bell Mach. Co., 83 F. 2d 365, 29 U. S. P. Q. 217.....	12
Wallace & Sons v. The Ellmore Silver Co., 91 Fed. Supp. 703, 85 U. S. P. Q. 479.....	20
Whiteman v. Matthews, 216 F. 2d 712.....	9, 10

RULES

Federal Rules of Civil Procedure, Rule 52(a).....	16
---	----

No. 15,128

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT W. BROWN & CO., INC., ROBERT W. BROWN and
OLIVE W. BROWN,

Appellants,

vs.

LEONARD DEBELL (substituted for U. S. License Frame
Mfg. Co.),

Appellee.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

This case is for infringement of Design Letters Patent No. D-167,878 granted October 7, 1952 to Joseph C. Bessolo. The patent covers a design for an automobile license plate holder. Bessolo assigned the rights to said patent to the original plaintiff, U. S. License Frame Manufacturing Co. Before trial, Leonard DeBell, the present plaintiff was substituted for plaintiff.

The complaint alleges that defendant Robert W. Brown & Co., a California corporation, and defendants Robert W. Brown and Olive W. Brown, husband and wife and president and secretary, respectively, of said corporation infringed the Bessolo design patent.

The defendant corporation was incorporated in July of 1953. Prior to that time the original plaintiff, U. S. License Frame Mfg. Co. had long been engaged in the manufacture and sale of automobile license plates.

The defendant Robert W. Brown had been for some period of time selling license plate frames manufactured by U. S. License Frame Mfg. Co. Brown obtained orders as a sales representative and said orders were billed directly to the customer by the U. S. License Frame Mfg. Co. and all remittances were sent directly to the U. S. License Frame Mfg. Co. including any collections made by the defendant Robert W. Brown [R. 158].

During the time the defendant Robert W. Brown was selling license frames of the design of the Bessolo patent and manufactured by U. S. License Frame Mfg. Co. he took an order for delivery to Eddie Nelson Inc. [R. 158]. The U. S. License Mfg. Co. delivered a portion of said order and thereafter the defendant Robert W. Brown and U. S. License Frame Mfg. Co. severed their relationships [R. 164, 165]. Subsequent to severing of relationships between U. S. License Frame Mfg. Co. and defendant Robert W. Brown, the defendant Robert W. Brown arranged the cancellation of an unfilled balance of said order which he had taken for U. S. License Frame Mfg. Co. and under which part shipment had been made [R. 159].

The defendant Robert W. Brown proceeded to supply infringing frames as indicated by Exhibit 2 to Eddie Nelson Inc. [R. 160]. The defendant not only supplied license frames to Eddie Nelson Inc. but also to a number of other users. One of the other such frames so supplied

by defendant is the "Phil Hall" frame, one sample of which is plaintiffs' Exhibit 4 [R. 31].

From judgment for plaintiff the defendants have appealed.

The appellants have stated that the questions for determination are as follows: (1) Does the Bessolo design patent in suit embody any invention over the prior art?, and (2) Does the accused device contain that invention?

More correctly stated, the questions are: (1) Is the Bessolo design patent valid?, and (2) Have the defendants infringed the Bessolo patent?

II.

SUMMARY OF ARGUMENT.

A. THE BESSOLO PATENT IS VALID AS EXEMPLIFIED BY ABSENCE OF ANTICIPATORY ART.

The Patent Office has diligently searched and failed to find any anticipatory art. The additional art cited by appellants is even less pertinent than that considered by the Patent Office and rejected by the Patent Office as not being anticipatory.

The Trial Court found that the file wrapper reference patents did not negate the invention of the patent and found that the additional references of the defendants were even less relevant and did not disturb the validity of the patent. The Gazan patent considered by the Court was found to show only that the Patent Office fully considered all issues raised in connection with the Gazan and Bessolo patents and decided in favor of the validity of the Bessolo patent.

B. THE COMMERCIAL SUCCESS AND COPYING OF THE BESSOLO DESIGN BY COMPETITORS EMPHASIZES THE VALIDITY OF THE BESSOLO PATENT.

The Court found that the design of the patent in suit met with widespread acceptance in the trade and with great commercial success and widespread copying by competitors thus strengthening the presumption of validity already attached to the issuance of the patent.

C. THE LAW ON THE SUBJECT FULLY SUSTAINS THE VALIDITY OF THE BESSOLO PATENT.

The presumption of validity of the patent was found to be sustained by the facts and the evidence, both oral and documentary, which fully supported the finding of the Court that the Bessolo patent is valid.

D. THE BESSOLO PATENT IS INFRINGED BY THE DEFENDANTS' LICENSE FRAMES.

All essential characteristics of the Bessolo patent are found to be present in the defendants' license frames. The Court found that they were substantially identical with the design of the patent and that they embody the invention of the Bessolo patent and are an infringement thereof.

E. THE LAW OF INFRINGEMENT SUSTAINS THE JUDGMENT OF THE LOWER COURT.

The law as repeatedly expressed regarding design patents is clear that the copying of a design embodying a new and pleasing combination which has been patented constitutes infringement.

III.

ARGUMENT.

A. The Bessolo Patent Is Valid as Exemplified by the
Absence of Anticipatory Art.

The references cited and actions taken by the Examiner in the Patent Office prove conclusively that he was diligent in searching for prior art and that he located all references which might conceivably be of any importance.

That there is a presumption of validity of a patent is not disputed by the appellants, but on the contrary, is admitted. The appellants attack the presumption of validity on the ground that certain prior art was perhaps not considered by the Patent Office. On the other hand, it is quite clear from the file wrapper, and from an examination of the alleged references that the defendants think perhaps were not considered, that on the contrary all conceivable references *were* considered, and the Examiner was most diligent in his search. In this regard the appellant makes much of the ruling by this Court in the case of *Gomez, et al. v. Granat Bros., et al.*, 177 F. 2d 266 (1949), in which the Court said in part:

“The presumption of *prima facie* validity of patent is greatly weakened, if not destroyed, when *pertinent* prior art is not considered by the Patent Office.”
(Emphasis added.)

It is most important that the word “pertinent” and its importance be considered with reference to this case and other citations and argument of the appellants in this regard. It is further important to note that if the case of *Gomez, et al. v. Grant Bros. et al.*, be reviewed more thor-

oughly, it will be clear that a different situation existed than in the case at suit. In the *Gomez* case it will be noted that of a large number of prior art patents apparently none were referenced or considered by the Patent Office.

In the case at bar it is quite clear that the Trial Court did not consider the designs of McRuer [Ex. N], Orester [Ex. M], Western Auto [Ex. J-1] or Douglas [Ex. A-1] as worthy of citing against the Bessolo design. In particular the court found:

“documentary exhibits submitted by the Defendants as prior art, the catalog Exhibit J and the Orester and McRuer patents, Exhibits M and N, are not as relevant as the patents relied on by the Examiner and in no way disturb the validity of the patent in suit.” [R. 20.]

With regard to the Douglas Company frames the Court found:

“The license frames illustrated in Exhibit A-1 and before the Court as Exhibits A-5, A-10, and A-15, are simple stampings with silk screen lettering thereon, the overall appearance of which is materially different from that of the license frames sold by plaintiff under the patent in suit.” [R. 21.]

Further the Court found that the Douglas Frames were in all material respects the same as the frames illustrated by file wrapper reference patents. The Court repeatedly found that each and every so-called anticipation was, in fact, not anticipation and not relevant.

The McRuer [Ex. N] and Orester [Ex. M] patents require no discussion since they bear none of the features of the patent at bar unless it be that above and beneath the space where numbers will appear there are places in

which advertising matter may appear. In both cases, it will be observed that neither of the patents discloses a design which would appear to suggest the Bessolo design to a casual observer or to an expert.

With further reference to the Douglas Frames, not only did the Court find as above indicated that they did not anticipate the plaintiff's patent but in addition the Court found that they were of very little evidentiary value [R. 21].

Appellants state that the design is utilitarian and functional, but this is immaterial. The Court is fully aware of the law that the mere fact that the object has utilitarian and functional features does not defeat nor in any manner interfere with the validity of a design patent.

The recent case of *Falcon Industries, Inc., et al. v. R. S. Herbert Co., Inc., et al.*, 128 Fed. Supp. 204, 104 U. S. P. Q. 301, in which a design patent for a smoker's pipe was found valid and infringed, fully expresses the law in this regard; in this case, the Court stated at page 212:

"Invalidity is further urged because of the functional elements of plaintiff's design, and if this means that only a design which comprehends no useful elements can be the subject of a valid design patent, it does not correctly state the law. The statute is not restricted to solely esthetic concepts."

"Judge Hough said in *Diets, etc. vs. Burr, etc.*, 243 F. 592 at 594:

"While design patents are not intended to protect a mechanical function, or to secure the patentee monopoly in any given mechanism or manufacture as such, it is immaterial that the subject of the design may embody a mechanical function, provided that the design *per se* is pleasing, attractive, novel, useful and

the result of invention. *Ashley v. Weeks, etc. Co.*, 220 F. at 901, 136 C. C. A. 465. But it is the design that is patented, not the mechanism dressed in the design.' ”

The important features of the Bessolo design are clear and apparent from the design itself and from the argument advanced by Bessolo's counsel in the Patent Office prosecution, to which appellants have made a partial reference on page 7 of their brief. Appellants indicate the weakness of their case by attempting to divert the attention of the Court from the essential facts by indicating an incomplete, and therefore misinformative portion of the facts. The full and complete reference to the Bessolo file wrapper shows that it was stated:

“Furthermore, no one frame has depressed, dimpled indicia surfaces with smooth-faced letters on both upper and lower faces of the one frame.”

and further stated:

“As to the differences in specific features, it will be noted that the indicia surfaces are dimpled, that the lower indicia surface is almost double the width of the upper indicia surface, so that the lower surface indicia may be emphasized over the upper indicia. These are features which have made these frames very attractive, as evidenced by the success thereof since they were designed.” [Ex. G-8.]

The effect of any alleged anticipation upon the presumption of validity must relate to the word “pertinent” as used in the cases cited by the appellant. It is quite obvious that there has been no *pertinent* prior art; thus, it is equally clear that the presumption of validity must stand and that such validity is strongly born out by this very point.

It is clear and well established law that every design must, of necessity, embody something old and known. It is how the old and known elements are used which determines invention. This point is well expressed in *Sel-O-Rak Corp. v. Henry Hanger & Display Fixture Corp. of America, et al.*, 232 F. 2d 176, 109 U. S. P. Q. 179, a Fifth Circuit case decided April 18, 1956, in which validity of a design patent was upheld and in which the Court said among other things as follows at page 178:

“In our consideration of the basic question as to the validity of the patent, we start with the knowledge that every design must of necessity embody something old and known. Design being only a rearrangement of line and form, it must always depend upon elements that are in a strict sense old. We are not impressed, therefore, with appellee’s attack on the design patent here on the ground that it combined known components. The straight line, the square, the circle, the cube, triangle and sphere are all known components. They are all old. But any design patent, it seems to us, must, of necessity, combine some of these elements.”

The design patent law which is accepted by all authorities is found in *Gorham v. White*, 80 U. S. 511 and *Dobson v. Dornan*, 118 U. S. 110 and the cases subsequent thereto emphasizing and affirming the points therein made. To avoid repetition and to shorten this brief the *Gorham* and *Dobson* cases are referred to in connection with *Glen Raven, etc. v. Sanson, etc.*, 189 F. 2d 845, 89 U. S. P. Q. 470, which is quoted at length under Point C of this Argument. *The law on the subject fully sustains the validity of the Bessolo patent.*

The case of *Whiteman v. Matthews*, 216 F. 2d 712, 1954, is cited by the appellants as proof that testimony of certain

witnesses is not to be disregarded and that the testimony in this case establishes invalidity of the patent.

Of course, the citation, as quoted in appellants' brief certainly does express the law. However, it is necessary to read a little more of the case of *Whiteman v. Matthews* to get the full import of what this Court said in that case. In that case there was an appeal from a judgment of invalidity of a patent. On appeal it was held that the Trial Court's decision was correct based upon the facts and the findings of the Trial Court and it is a portion of this decision which the appellants have quoted.

This Court, in that case, *held that the Trial Court alone had the opportunity to see and hear the witnesses testifying* and said in part as follows:

“Finally, the Trial Court alone had the opportunity to see and hear the witnesses testifying regarding the Spencer machine and to use that invaluable aid in judging the credibility of such witnesses and the weight which should be given to their testimony. Taking into account all of the foregoing, we cannot say that the Court below was in error in its finding of prior public use of the Spencer machine.”

It is clear that this Court in the *Whiteman v. Matthews* case fully expressed the well established rule that the Trial Court is in a position to adequately and properly judge and rule upon questions of fact and to evaluate the testimony. This is exactly the position of appellee in the case at bar, to wit, that the Trial Court has made its findings regarding these facts, has made them upon good and sufficient evidence, and its decision should be affirmed.

And further, in the case at bar the Trial Court found the testimony of the defendants' witnesses “neither convincing nor persuasive.” [R. 24.]

B. The Commercial Success and Copying of the Design in Question by Competitors Emphasizes the Validity of the Bessolo Patent.

The license frames of the Bessolo design met with immediate and outstanding commercial success as emphasized by the testimony of the witness Wallace Titzel [R. 149]. The question of commercial success indeed, is not questioned by the appellants and the record indicates that the appellants were successful in the sale of their infringing product. The defendant Robert W. Brown testified:

“We had been working day and night completing orders and delivering orders that we had” [R. 165].

The law is clear that commercial success is of great importance in determining the validity of a design patent and has a great bearing upon the case. The case of *Glen Raven Knitting Mills, Inc. v. Sanson Hosiery Mills, Inc. et al.*, 189 F. 2d 845, 89 U. S. P. Q. 470, a Fourth Circuit case is of great interest in many respects in comparison to the case at bar, and it makes particular reference to commercial success. In the Glen Raven case the patent in question was a design patent for a so-called “picture frame” reinforced heel for ladies stockings. The principal characteristic of this patent was a border about the reinforced area of the heel. In connection with the commercial success in said case the Court stated among other things at page 853 as follows:

“The especial importance of commercial success in determining the validity of design patents is recognized by the decisions of the Courts. See *J. R. Wood & Sons, Inc. vs. Abelsons, Inc.*, 3 Cir., 74 F. 2d 895 [24 USPQ 4]; *Standard Match Corp. v. Bell Mach. Co.*, 7 Cir., 83 F. 2d 365, 367 [29 USPQ 217, 218-219]. The immediate success of the ‘Picturesque’,

‘Picture Frame’ and ‘Dupliquette’ stocking, its command of a higher price, its refined simplicity and ease of manufacture, its acceptance by competitors, and its reception and acclaim by the world-wide public all attest to something more than commonplace ornamentation or uninspired reassembly of old ideas.”

The foregoing case was cited with approval in the case of *R. M. Palmer Company v. Luden’s, Inc.*, 111 U. S. P. Q. 1, a Third Circuit case decided August 22, 1956 in which design patents were held valid and infringed. Another case particularly pointing out the importance of this factor in sustaining the validity of a design patent is *Standard Match Corp. v. Bell Mach. Co.*, 83 F. 2d 365, 29 U. S. P. Q. 217, a Seventh Circuit Court. In this case the patent was held valid and infringed and the Court said, among other things at page 367:

“In view of what was said in *Wahl Clipper Corporation vs. Andis Clipper Co.*, 66 F. (2d) 162, we would have been better satisfied if the parties had furnished us with more complete and detailed evidence of the public’s reception of these bibelots. Whether a design which is novel and ornamental is entitled to coverage by design patent depends to a large degree upon the reception which those for whom it is made, accord it. If pleasing to the eye and acceptable to the trade as evidenced by extensive sale, we would naturally be inclined to uphold it.”

In the *Standard Match* case the Court went on to say that apparently the evidence indicated commercial success. This appeared to be a very important particular in this case.

In the case at bar there is ample evidence that prior designs and the Bessolo design, were sold competitively but that the Bessolo design was much preferred [R. 149, 153, 154 and 123]. See Finding 16 in which the Trial Court found:

“Following the first sale by the plaintiff U. S. License Frame Mfg. Co. of license frames embodying the design invention of the patent in suit, said plaintiff continued to manufacture and sell said license frames, and in spite of the fact that their selling price was higher than other designs sold by Plaintiff, said sales continued to increase over the years with respect to and until they surpassed other designs of license frames manufactured and sold by Plaintiff. Said license frames embodying the design of the patent in suit were substantially copied by numerous competitors in the field. This commercial acceptance by the trade of license frames embodying the design of the patent in suit and particularly the widespread copying thereof by competitors strengthens the presumption of validity attaching to the issuance of the patent.” [R. 16 and 17, Finding 16.]

In the case at bar, the appellants apparently agree that the design in suit is a great advance over any prior design since they deliberately sought out, selected and copied the design of the patent in suit over all of the alleged prior art which was equally available to them. For example, the Watts, Overton, and Orestor patents had expired long before defendants commenced their operation and could have been used with complete impunity, but defendants chose to appropriate the Bessolo design.

C. The Law of the Subject Fully Sustains the Validity of the Bessolo Patent.

The findings of the Trial Court completely support the validity of the Bessolo patent. The Court found that the design had been well and favorably received in the trade and that although the plaintiff continued to manufacture and sell frames of a lower price than the sales of frames embodying the design of the Bessolo patent continued to increase and surpass the other designs manufactured and sold by the plaintiff and that there was widespread copying thereof by competitors. [R. 16 and 17, Finding 6.]

The Court considered all the alleged prior art and found that none of the evidence anticipated or negated the invention of the patent in suit and in particular found as follows:

“Said file wrapper reference patents do not anticipate or negative invention of the patent in suit and the Examiner did not err in allowing and issuing said patent.” [R. 20.]

and

“As to the other documentary exhibits submitted by defendants as prior art, the catalog Exhibit J, and the Orestor and McRuer patents Exhibits M and N, are not as relevant as the patents relied upon by the Examiner and in no way disturb the validity of the patent in suit. The Gazan patent, Exhibit H, is later in point of time and therefore not prior art against the patent in suit. The Gazan file wrapper, Exhibit I, is relevant only to show that the Patent Office fully considered all issues raised in connection with the Gazan and Bessolo patents and decided same in favor of the Bessolo patent in suit.” [R. 20, Finding 14.]

The Court also considered the deposition of Stanley M. Olson and the Douglas Company exhibits and found they were of little evidential value and in particular found that even taking them at their face value and conceding facts not proven, still

“they do not anticipate the ornamental design of the patent in suit, which demonstrates invention over said exhibits.” [R. 21, Finding 16.]

The Court further considered the so-called Cobb frame and found among other things

“there is no evidence whatsoever that frames made according to Exhibit 5 were made or sold prior to March 6, 1948, the effective date of the patent in suit.” [R. 22.]

With further regard to the Douglas frames and mentioning the Overton and Griffith file wrapper patent references, Exhibits G-3 and G-2, the Court found in Finding 18:

“None of said exhibits shows the ornamental design of the Bessolo patent and none of said exhibits, taken singly or in combination, supports defendants’ contentions of lack of novelty and invention.”

With reference to the testimony concerning manufacture and sale of license frames, Exhibits C, D and K, the Court stated in Finding 19 as follows:

“The testimony concerning the manufacture and sale of license frames, Exhibits C, D and K, prior to the invention of the patent in suit, is not convincing. At best, it merely shows the existence of two-cavity master dies which *might have* been used to produce said frames but which were equally suitable for and were commonly used to make other and different kinds of frames of varying sizes to meet the

requirements of various state laws. Master dies are made for the express purpose of permitting the manufacture by the use of but one die of many different kinds of frames. The evidence as to the use of such dies before the patent in suit to make frames of any particular design and specifically frames similar to Exhibits C, D, and K is neither convincing nor persuasive. The evidence as to said exhibits does not disturb the validity of the patent in suit which clearly discloses and claims a new and ornamental design." [R. 23 and 24, Finding 19.]

There is a large amount of evidence, both oral and documentary to fully support all findings of the trial court in this case and the Ninth Circuit Court of Appeals and other Circuit Courts have repeatedly recognized and reiterated that in patent cases, as in other cases, the findings of fact of the trial court, where supported by substantial evidence, should not be set aside.

Anthonson v. Hedrick (C. C. A. 9), 89 F. 2d 149, 151, 33 U. S. P. Q. 180, 182;

Gasifer Mfg. Co. v. General Motors Corp. (C. C. A. 8), 138 F. 2d 197, 199, 59 U. S. P. Q. 259, 261-262;

Ruth v. Climax Molybdenum Co. (C. C. A. 10), 93 F. 2d 699, 702, 36 U. S. P. Q. 128, 131-132.

Rule 52a of the Rules of Civil Procedure succinctly states it as follows:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The case accepted by all authorities as *the* leading case on design patent law is the decision of the Supreme Court

in *Gorham v. White*, 81 U. S. 511. The *Gorham* case was cited with approval in the Fourth Circuit Court case of *Glen Raven, etc. v. Sanson, etc.*, 189 F. 2d 845, 89 U. S. P. Q. 470, in which the Court quoted from the *Gorham* case as follows:

“The acts of Congress which authorize the grant of patents for designs *were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance*, and that, not an abstract impression, or picture, but an aspect given to those objects mentioned in the acts. * * * And the thing invented or produced for which a patent is given is *that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its saleable value, may enlarge the demand for it, and may be a meritorious service to the public.* It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them. Manifestly the mode in which those appearances are produced has very little, if anything, to do with giving increased saleableness to the article. *It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly if not entirely the contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both conjointly, but, in whatever way produced, it is the new thing, or product which the patent law regards.* * * * We do not say that in determining whether two designs are substantially the same,

differences in the lines, the configuration, or the modes by which the aspects they exhibit are not to be considered; but we think the controlling consideration is the resultant effect.” (Emphasis added.)

The basic concept of design patent protection as enunciated in *Gorham v. White* has been the accepted standard in all circuits, and is still the basis of this part of the patent law.

In the *Glen Raven* case, the Court was adjudicating Design Patent No. 151,732 for a lady’s stocking with an ornamental heel portion. The decision includes pictures of the plaintiff’s and defendant’s design, and of the most pertinent prior art patents, and thoroughly reviews the law in a masterly fashion. In speaking of the question of validity, the Court of Appeals in the *Glen Raven* case states as follows:

“Validity is to be tested by the appearance of the patented design as a whole. *Dobson v. Dorman*, 118 U. S. 10, 15. ‘A combination of elements that are old is patentable, if it produces a new and useful result as the product of the combination; and a design which avails itself of suggestions old in art is patentable if, as a whole, it produces a new and pleasing impression on the aesthetic sense.’ *Matthews & Willard Mfg. Co. v. American Lamp & Brass Co.*, 3 Cir., 103 F. 634, 639.” (Emphasis added.)

Further quoting from the *Glen Raven* case, we find the Court of Appeals stating as follows:

“It is true that the patent lies in a restricted field and pertains to an article that may seem of minor importance in the development of the industrial arts. But all design patents are of the limited scope which is attendant upon appearance rather than utility; and Congress has ordained in the statute covering

design patents, 35 U. S. C., Sec. 73, that a patent shall be granted 'to any person who has invented any new, original and ornamental design for an article of manufacture.' *It is on this plane that the merits of the design must be judged*; and it must be borne in mind that the inventive skill as well as the originality, which are essential to validity, relate entirely to the appearance of the article and the appeal to the eye." (Emphasis added.)

With respect to the added weight given to commercial success in evaluating *design* inventions, the Court in the *Glen Raven* case says:

"It is therefore obvious that in dealing with patents of this kind much weight must be given to commercial success, and all the more so when wearing apparel, which must please the buyer, is the subject to which the design applies. No one will deny the great practical importance of the manufacture of women's clothing in the industrial field or that persons skilled in the art are constantly endeavoring to produce garments that will have popular appeal. The fact that prior to the spectacular success of the Bley design such an effort was made for a long period in the limited field to which this case applies is sufficient proof that the patentee's contribution was not obvious to the ordinary person, and justifies the finding that the patent is valid. *The especial importance of commercial success in determining the validity of design patents is recognized by the decisions of the Courts.* See *J. R. Wood & Sons, Inc. v. Abelson's Inc.*, 3 Cir., 74 F. 2d 385 (24 U. S. P. Q. 4); *Standard Match Corp. v. Bell Mach. Co.*, 7 Cir., 83 F. 2d 365, 367 (29 U. S. P. Q. 217, 218-219). The immediate success of the 'Picturesque,' 'Picture Frame' and 'Dupliquette' stockings, its command of a higher price, its refined simplicity and

ease of manufacture, its acceptance by competitors, and its reception and acclaim by the world-wide public all attest *to something more than commonplace ornamentation or uninspired reassembly of old ideas.*" (Emphasis added.)

The Bley design patent was also held valid and infringed in the Third Circuit in the case of *Sanson Hosiery Mills v. Warren Knitting Mills*, 202 F. 2d 395, 96 U. S. P. Q. 247.

Other recent cases holding design patents valid and infringed are:

Laskowitz v. Marie-Designer, Inc. (D. C. So. Cal.), 119 Fed. Supp. 541, 100 U. S. P. Q. 367 (contour chair—valid and infringed);

Palmer Company v. Luden's, Inc. (D. C. Pa.), 128 Fed. Supp. 672, 104 U. S. P. Q. 246 (affd. by C. A. 3);

R. M. Palmer Company v. Luden's, Inc., 111 U. S. P. Q. 1 (chocolate animals—valid and infringed);

Falcon Industries v. R. S. Herbert Co. (D. C. N. Y.), 128 Fed. Supp. 204, 104 U. S. P. Q. 301 (smoking pipe—valid and infringed);

Columbia Protektosite Co. v. Great American Plastics Co. (D. C. Mass.), 112 Fed. Supp. 39, 97 U. S. P. Q. 57 (toilet seat—valid and infringed);

Krieger v. Colby (D. C. So. Cal.), 106 Fed. Supp. 124, 95 U. S. P. Q. 4 (cap—valid and infringed);

Donaco Plastics v. Tray-Ware (D. C. Ohio), 87 U. S. P. Q. 29 (a supporting bracket—valid and infringed);

Wallace & Sons v. The Ellmore Silver Co. (D. C. Conn., 1950), 91 Fed. Supp. 703, 85 U. S. P. Q. 479 (a spoon—valid and infringed);

Fouch, dba Universal Microphone v. Associated Projects Co. (D. C. Ohio, 1948), 79 U. S. P. Q. 259 (a switch plate—valid and infringed).

See also:

Bourquin, dba Savoy, etc. v. Grandinetti (D. C. N. Y.), 43 Fed. Supp. 523, 52 U. S. P. Q. 160 (a fruit expressor—valid and infringed),

and,

Forestek Plating v. Knapp-Monarch Co. (C. C. A. 6), 106 F. 2d 554, 43 U. S. P. Q. 39 (a toaster and tray combination—valid and infringed),

in which the Court says:

“The object of the design statute is to encourage the decorative arts, and a new design, if it does no more than please the eye, is the proper subject of a design patent, regardless of utility, even though it is a reassembling or regrouping of familiar forms and decorations. *Protex Signal Co. v. Feniger*, 11 F. 2d 43 (C. C. A. 6); *Pelouse Scale & Manufacturing Co. v. American Cutlery Company*, 102 F. 916 (C. C. A. 7); *Franklin Knitting Mills, Inc. v. Gropper Knitting Mills, Inc.*, 15 F. 2d 375 (C. C. A. 2); *Graff Washbourne & Dunn v. Webster*, 195 F. 522 (C. C. A. 2).”

The preceding discussion has dwelt at length on the *Glen Raven* case and the cases therein cited. The patent involved in the *Glen Raven* case and declared valid and infringed therein was the subject of a large number of cases including:

Nebel Knitting Co. v. Sanson Hosiery Mills, Inc., 214 F. 2d 781, 102 U. S. P. Q. 142;

Sanson Hosiery Mills, Inc., et al. v. Warren Knitting Mills, Inc., 202 F. 2d 395, 96 U. S. P. Q. 247;

Sanson Hosiery Mills, et al. v. Warren Knitting Mills, Inc., 95 U. S. P. Q. 138;

Sanson Hosiery Mills, Inc., et al. v. H. S. Kress Co., Inc., 109 Fed. Supp. 383, 95 U. S. P. Q. 142,

in all of which the patents were held valid and infringed.

It is well to note the similarity of the patent in suit in the *Glen Raven* case and the other cases indicated as compared to the case at bar. The *Glen Raven* cases involve a so-called "picture frame" design around a reinforced heel of ladies' stockings. Thus, it can be seen that there is involved in the *Glen Raven* case a simple question of a frame of a specific design about a portion of an article.

It is clear that the same question is involved here and that we have a frame of specific design to go about a vehicle license plate.

In both the *Glen Raven* cases, which have had such repeated court support, and the case at bar there are certain characteristic features of the frame which make it appear to the eye to be something different from that which had preceded it in the art. That something which is different has made both achieve commercial success and has given both the pleasing quality desired by the public. And, in both, there were a number of efforts made in the limited fields for a long time before, but in each case no one before evolved the design which finally became the one which was successful.

D. The Bessolo Patent Is Clearly Infringed by the Defendants' License Frames.

The designs of both Bessolo and Brown are that of a generally rectangular license frame with rounded corners and a broad space at the top and bottom, one being wider than the other, and both of them being indented for the placing of the names of dealer and city within said indented spaces. The indented spaces are dimpled and smooth letters indicating the name of the dealer and city and placed within the dimpled areas. One of the spaces extends outward from the line of the edge of the frame and the other of said spaces is flush with the edge of the frame.

The appellants make much in their brief of the fact that the lower portion of the Bessolo design patent is broader than the upper portion, while this is reversed in the infringing Eddie Nelson article. Such a statement does not state the facts correctly, is incomplete, and is misleading.

The weakness of the appellants' position is very well exemplified by the attempt of the appellants to divert the Court's attention from the facts by a misleading view of the situation as indicated by the sketches attached to the appellants' brief and referred to on page 6 of appellants' brief.

It will be observed that the appellants have accurately portrayed the design of the Bessolo patent but they have not accurately portrayed the infringing frame, Exhibit 2, in the very important particular that the appellants

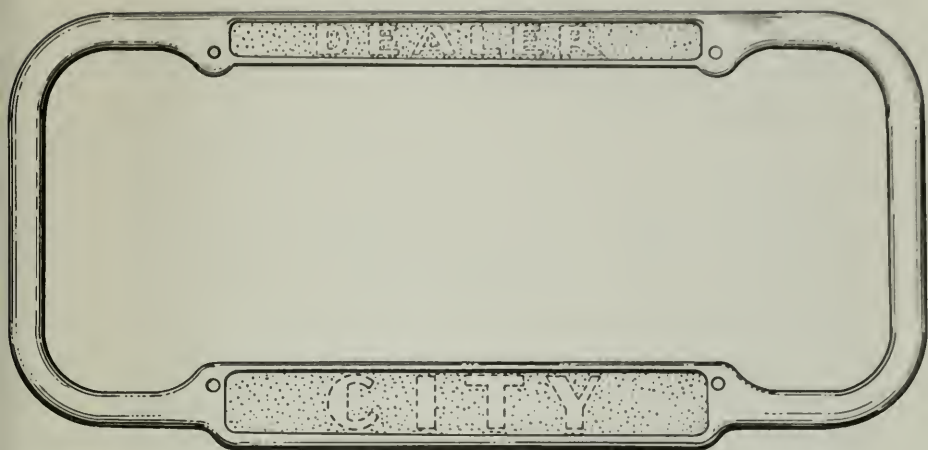
have omitted the dimpling of the recessed portion of the frame wherein the wording is attached.

This, however, is not so important as the fact that the appellants have made references on page 7 of their brief to a remark by Bessolo's counsel in the file wrapper of the Bessolo patent regarding the fact that the lower indicia surface is almost double the width of the upper indicia surface and pointing out that the accused device does not have that feature and actually embraces a smaller lower indicia surface, rather than larger.

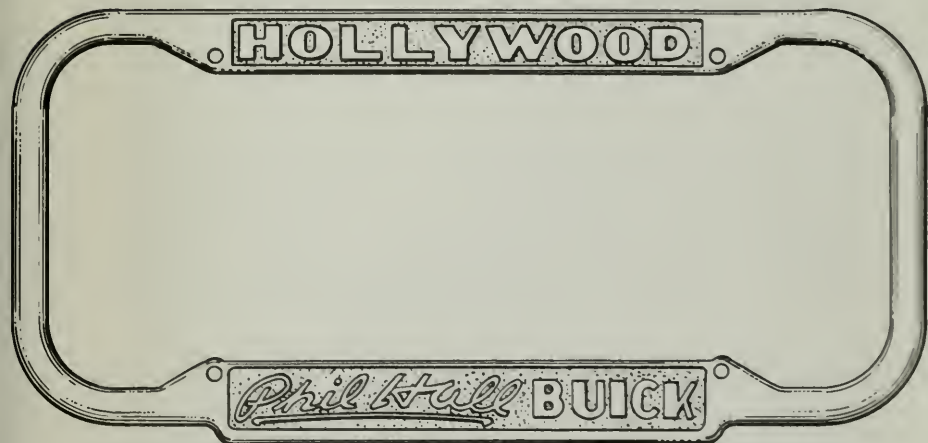
This effort to divert the Court's attention, the appellee is confident, will not be successful, and *particular reference is made to the defendants' infringing license plate, Exhibit 4*. In this case it will be observed that the lower indicia surface is approximately double the width of the upper indicia surface, *exactly as in the Bessolo patent*. Also, it will be observed that the over-all appearance is virtually identical to the Bessolo patent. For the Court's convenience, a sketch is set forth on the opposite page showing the design of the Bessolo patent and the design of the infringing device, Exhibit 4.

Further, it is not difficult to see that the Eddie Nelson infringing device Exhibit 2 is really the same design, but merely reversed through 180 degrees. Such reversal is common in the trade and it has been conceded that it is customary in the trade to supply license frames with a larger insert either on the bottom or on the top, as the customer may desire, and that the holes for mounting are uniform so that it may be thus reversed and work either way. [R. 31.] Such reversal in no way changes or affects the design.

When these facts are observed in particular reference to the emphasis appellants place upon the fact that the



**BESSOLO DESIGN PATENT 167,878, IN SUIT
PLAINTIFFS EXHIBIT "I"**



**ACCUSED DEVICE
PLAINTIFF'S EXHIBIT "4"**

lower portion of the Bessolo design is broader than the upper portion and the inaccurate drawings attached to the appellants' brief, it is clear that an exact infringement exists in the case at bar.

Comparing, once again, the features of the defendants' frames and of the Bessolo patent, it is observed that the over-all design is substantially identical; that the infringing articles, compared with the patent and plaintiff's frame embodying the patent design, are substantially identical in all respects; that the surface area upon which the letters are placed is dimpled in the patent and the infringing frame; that all are indented in a similar manner; that the letters are placed thereon in a similar manner; that the curvatures are substantially identical, and the placing of holes for mounting with reference to the advertising portions is substantially identical. Indeed, the Court found in Finding No. 10 as follows:

"The license frames exemplified by Exhibit 2 sold by Robert W. Brown and Robert W. Brown & Co., Inc., to Eddie Nelson and others are substantially identical with the patent in suit, Exhibit 1, and frames made by plaintiff thereunder as exemplified by Exhibits 3 and 3-A. Said frames sold by Defendants incorporate the new and ornamental design of the patent in suit, are in all respects substantial duplicates thereof, embody the invention of said Letters Patent, and are an infringement thereof." [R. 19.]

The finding of the Court makes it clear that the *Defendants' frames infringed the patented design*, that the Court inspected the Plaintiff's frames embodying his design and that such inspection only further confirmed the Court's finding of infringement.

E. The Law of Infringement Sustains the Judgment of the Lower Court.

The law as heretofore expressed with reference to the case of *Gorham v. White*, as quoted in the *Glen Raven etc. v. Sanson etc.*, 189 F. 2d 845, 89 U. S. P. Q. 470, is equally applicable to the point made here. Since an exhaustive review of this law was heretofore quoted, it will not be again reviewed, except by brief reference.

The Court said in the *Gorham* case:

“We hold therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.”

Further, in one of the hosiery cases: *Sanson Hosiery Mills, Inc., et al. v. H. H. Kress Co., Inc.*, 109 Fed. Supp. 383, 384, 95 U. S. P. Q. 142:

“Actual comparison for minute inspection is not a fair test. The imitation may be on display when the patented article is not present. In such a situation one seeking a stocking with a picture frame border would readily accept the imitation. A counterfeited \$20.00 bill may be fairly easy to detect by one reasonably skilled in handling money if a genuine bill is present for comparison, but it is extremely difficult to detect some of them in the absence of a genuine one for comparison. A design patent protects the general design, the pictured effect on the mind from a general view, rather than details revealed by a minute test. Therefore, testimony of a comparison test is not exclusive nor conclusive.”

The Court recognizes that the majority of all patents in this modern day are for a combination of elements. Most of these separate elements could be found some place in the prior art, and this does not act to bar or prevent the invention by appropriate combination. Reference is once again made to *Dobson v. Dornan*, 118 U. S. 10, 15:

“A design which avails itself of suggestions old in the art is patentable if, as a whole, it produces a new and pleasing impression on the aesthetic sense. *Martineux & Willard Mfg. Co. v. American Lamp & Brass Co.*, 3 Cr., 103 F. 634, 639.”

This point is further emphasized by the Court of Appeals for the Sixth Circuit in *Forestek Plating & Mfg. Company v. Knapp-Monarch Company*, 106 F. 2d 554, 43 U. S. P. Q. 39, in which a design patent was held valid and infringed. The Court said, among other things, at page 560:

“The object of the design statute is to encourage the decorative arts, and a new design, if it does no more than please the eye, is the proper subject of a design patent, regardless of utility, even though it is a reassembling or regrouping of familiar forms and decorations. [Citing cases.]”

IV. CONCLUSION.

In the case at bar *the Bessolo design has been found both by the Patent Office and the Trial Court to be completely new*, and to involve invention over the prior art, and to the extent that it embraces any previously disclosed art, it puts it in an entirely new and pleasing combination, as indicated by commercial success and copying. The Trial Court had ample opportunity to examine all wit-

nesses and evaluate all evidence of whatever nature. The Bessolo design has arranged various elements in a particularly attractive stream-lined fashion, and the defendants have infringed by making and selling a substantially identical copy of the Bessolo patent. The relationship of the defendant Robert W. Brown to the U. S. License Frame Manufacturing Company was such that he had ample opportunity to present the Bessolo design to the trade and learn of its popularity; in so doing, he took and used the substance of the Bessolo patent. The Court found in particular:

1. That the patent in suit "Clearly discloses and claims a new and ornamental design" [R. 24]; and

2. That the defendants' license frames "incorporate the new and ornamental design of the patent in suit, are in all respects substantial duplicates thereof, embody the invention of said Letters Patent, and are an infringement thereof."

The Judgment of the District Court should be affirmed.

Respectfully submitted,

FULWIDER, MATTINGLY & HUNTLEY,
ROBERT W. FULWIDER and
WILLIAM K. YOUNG,

Attorneys for Appellee.

